BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of		
Application of SBC Communications Inc., Pacific Bell Telephone Company, and Southwestern Bell Communications Services, Inc. for Provision of In-Region, InterLATA Services in California	)	WC Docket No. 02-306

REPLY COMMENTS OF AT&T CORP.

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November 4, 2002

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REPLY COMMENTS OF AT&T CORP.

Pursuant to the Commission's Public Notice, AT&T Corp. ("AT&T") respectfully submits these reply comments in opposition to the application of SBC Communications, Inc., ("SBC"), Pacific Bell Telephone Company ("Pacific"), and Southwestern Bell Communications Services, Inc. ("SBCS"), for authorization to provide in-region, interLATA services in California.

INTRODUCTION AND SUMMARY

The comments, the Evaluation of the Department of Justice ("DOJ"), and new evidence submitted since the filing of comments all confirm that Pacific's application for interLATA authorization in California is premature. As the California Public Utilities Commission ("CPUC") initially found, and as the record developed in this proceeding underscores and amplifies, Pacific has yet to demonstrate either that it has fully implemented the competitive checklist, or that interLATA authorization would be in the public interest. Although Pacific is following the pattern of recent BOC 271 applicants by waiting until after the filing of its initial application to present key evidence of checklist compliance, here that strategy is counterproductive. Pacific's *ex parte* filings and other new evidence do not overcome the stark showing of checklist noncompliance and continuing anticompetitive conduct that the comments have identified. Indeed, in several important respects, the new evidence shows only that the problems persist, and if anything are getting worse.

Part I of these Reply Comments addresses Pacific's failure to set cost-based rates for unbundled network elements. The comments, the DOJ Evaluation, and a recent statement by SBC's Chairman all confirm that, because of Pacific's own delaying tactics, Pacific's current UNE rates could not be and were not set according to a TELRIC-based rate-setting methodology. For this reason alone, the Commission cannot find that Pacific's California rates are cost-based. Although Pacific has not met its burden of proving that its UNE rates are cost-based, the comments further provide some specific examples of the non-cost-based nature of many of Pacific's individual UNE-rates. The commenters note, for example, that Pacific's rates for DS-1 and DS-3 loops are far in excess of even the inflated Texas rates to which Pacific has pointed (erroneously) as a "benchmark" to support its UNE rates. Pacific's individual vertical-feature charges are also obviously non-cost-based, as are its non-recurring charges, which the CPUC has already found to be improperly inflated because they unlawfully allow Pacific to recover numerous recurring costs.

The comments as well as the *Massachusetts 271 Appeal Decision* also confirm that SBC may not rely on Texas rates as a benchmark to justify its California UNE rates. The Texas rates are based on eight-year old cost data that the Texas Public Utilities Commission has acknowledged are outdated, and that plainly do not reflect Pacific's current costs. As the D.C. Circuit stated, "ancient" UNE rates set in another state "cannot serve as a valid benchmark" for a pending 271 application, and none of the limiting factors on which the DC Circuit relied upon to uphold the Commission's use of New York rates as a benchmark for Massachusetts is present here.

The comments also confirm that Pacific's jerrybuilt true-up scheme cannot salvage Pacific's pervasive failure to establish cost-based UNE rates. Unlike past applications, where the Commission has relied on a promised true-up of a few minor interim rates to excuse the failure to fully implement permanent cost-based rates, here Pacific is seeking to rely on a true-up to cover-up the absence of permanent, cost-based rates for all recurring loop and switching rates, which are the most important

cost components of the UNE-platform. Pacific's reliance upon an unprecedented expansion of the true-up exception, if accepted, would render meaningless Section 271's requirement of full implementation of checklist obligations as a condition for interLATA authorization.

Pacific's true-up approach is untenable also because, as the DOJ observes, Pacific has not yet coherently explained how its proposed true-up would operate in practice. And in all events, Pacific's true-up approach will have no impact on UNE rates for certain network elements that are an essential part of the UNE-platform – such as signaling and transport – that are not interim (and thus not subject to true-up), and that are concededly not cost-based. Pacific's "true-up" therefore cannot overcome Pacific's failure to set permanent cost-based UNE rates.

Pacific's failure to fully implement the competitive checklist does not stop there. As discussed in Part II, Pacific has yet to provide CLECs with nondiscriminatory access to its operations support systems. The "fix" that Pacific implemented since the filing of opening comments that was intended to give CLECs equivalent access to alternative community names, for example, was not fully effective, because Pacific continues to reject some AT&T orders for failure to use the requisite alternative community name. Pacific has not even attempted to make the changes to its test environment needed to mirror the production environment, and those limitations are now delaying AT&T's ability to transition customers to facilities-based service (*i.e.*, to process migration orders from UNE-P to UNE-loop). AT&T's experience since the filing of opening comments also illustrates that Pacific has not solved, but has instead compounded, the confusion, delay, and increased costs that CLECs experience when attempting to use Pacific's multiple and ill-defined "help desk" centers. Recent filings further confirm that Pacific's OSS may not be deemed operationally ready, because Pacific has neither any commercial data nor any adequate testing to show that competitors will be able successfully to use the key software release (LSOG 5) on which they will rely to order the UNE-platform.

Pacific's recent *ex parte* submission of performance data for September, 2002, also confirms its failure to provide nondiscriminatory access to OSS. These data confirm, in measure after measure, that Pacific continues to provide better service to its own customers than it does to CLEC customers. The discrimination is most stark with respect to Pacific's provisioning of CLEC orders, and with respect to CLEC requests for maintenance and repair of UNE-P and UNE-L based service.

As set forth in Part III, the comments also confirm the CPUC's findings that Pacific has failed to meet its checklist obligations to resell DSL transport services and to provide access to Local Number Portability. The comments highlight the "shell game" that Pacific has pursued to evade its resale obligations by withdrawing a prior retail DSL transport offering through the manipulation of corporate affiliates. This pattern of anticompetitive conduct is all the more significant in light of the D.C. Circuit's recent *Massachusetts 271 Appeal Decision* that confirmed that withdrawal of a resale tariff would trigger review of the BOC's failure to meet its resale checklist obligation.

With regard to Local Number Portability, SBC recently implemented a mechanized system designed to prevent the serious service outages that SBC was previously imposing on CLEC customers, but has failed to provide either this Commission or the CPUC with any data showing the impact, if any, of the new system in preventing service outages. This omission is particularly serious because some of AT&T's customers have continued to experience outages since the implementation of the new system. There remains no evidentiary basis to reject the CPUC's finding that Pacific has not fully implemented its checklist obligations with respect to Local Number Portability.

Finally, Part IV describes how the comments and recent evidence overwhelmingly confirm the CPUC's judgment that granting Pacific's application at this time would not serve the public interest. As numerous commenters observe, the CPUC concluded, after extensive 271-related proceedings, that the BOC had neither irreversibly opened its local markets to competition nor demonstrated that it was deterred from engaging in anticompetitive conduct, cross-subsidization of its long-distance affiliate,

and other competition-foreclosing misconduct. This Commission has never before approved a BOC's 271 application in the face of such findings from a state commission, and the record compiled before this Commission only underscores why it should not do so now.

The comments demonstrate that the repeated imposition of record-setting fines has not deterred Pacific from anticompetitive conduct that has delayed or blocked local entry in numerous markets. Commenters present evidence that Pacific has engaged in unlawful price squeezes and has abused its position has PIC administrator, with anticompetitive effects on competition to provide a wide range of services, including DS-1 and DS-3 loops, DSL, intraLATA toll, paging, and payphone services, with some commenters reporting that Pacific's misconduct has forced them to leave the market altogether. The inevitable consequence, as several commenters observe, is that CLEC market share is lower (often substantially so) in California than the national average and lower than the share in most large states. The comments thus starkly confirm the CPUC's concerns that local competition in California exists at best on paper, rather than in reality, and that interLATA authorization at this time will harm the public interest by permitting Pacific to leverage its local monopoly into interLATA markets.

The record further demonstrates that fines alone will not deter SBC and Pacific from continuing to engage in anticompetitive conduct to preserve and leverage their local monopolies. Since the filing of opening comments in this proceeding, this Commission has fined SBC the maximum amount it could and the highest amount in its history -- $6 million – for requiring competing carriers to spend time and resources litigating in state proceedings to obtain nondiscriminatory access to a UNE (shared transport) that SBC was obligated to offer. The record further confirms that SBC sloughs off such penalties as a mere cost of maintaining its local monopoly. In a nightmarish repeat of its shared-transport debacle, SBC and Pacific are now requiring competitors to devote enormous and scare resources to continue to litigate in state and federal proceedings in order to prevent SBC and Pacific from blocking access to "new combinations" of network elements that are critical to effective UNE-

based residential competition in California and other SBC states, and that the United States Supreme Court has already required SBC and Pacific to provide.

The record thus leaves no doubt that, with SBC and Pacific, huge fines are a necessary, but not a sufficient, response to continuing anticompetitive conduct. Congress was well aware of the vast incentive and ability that an incumbent LEC retains to torpedo nascent local competition notwithstanding its protestations of checklist compliance. That is why Congress insisted that this Commission deny interLATA authorization, regardless of the BOC's checklist compliance, if such authorization would not serve the public interest. This Commission should therefore exercise the authority that Congress provided, and make clear that abandoning anti-competitive conduct and irreversibly opening the local market to competition on a truly nondiscriminatory basis are essential preconditions to obtaining interLATA authorization under section 271.

I. PACIFIC HAS FAILED TO DEMONSTRATE THAT ITS CALIFORNIA RATES COMPLY WITH CHECKLIST ITEM 2.

The comments and the evaluation of the Department of Justice confirm that Pacific's California rates are vastly inflated above the levels that any reasonable application of TELRIC levels would produce. The comments further confirm that Pacific cannot circumvent that deficiency in its application by relying on the Commission's short-cut benchmarking methodology, using Texas as the benchmark state, because Texas rates are not a valid benchmark. Indeed, the Texas rates are based on eight year old data. And as explained by the D.C. Circuit "[i]n a market with falling costs, ancient UNE rates cannot serve as a valid benchmark,"[1] and it would be reversible error if the Commission "sufficiently disregarded the issue of the rate's age so as to adopt rates that were unreasonably outdated."[2] Nor can Pacific escape this clear checklist violation by promising that the violation will be "fixed" at some future date by some unexplained true-up mechanism. As noted by the Department of

[1] *See WorldCom v. FCC*, 01-1198 (D.C. Cir. October 22, 2002), Slip Op. at 5.
[2] *Id.* at 6.

Justice, Pacific has failed to inform the Commission, the CPUC or potential entrants how the true-up mechanism will be applied, and Pacific's proposed true-up mechanism does not even apply to certain rates that are critical to competitive entry – *e.g.*, signaling and transport rates. In short, Pacific has not, and cannot, demonstrate that its California UNE rates satisfy checklist item two. Accordingly, Pacific's Application must be rejected.

A. The Comments Confirm That Pacific Has Failed To Satisfy Its Burden Of Proving That Its California Rates Are TELRIC-Compliant.

The comments and the evaluation of the Department of Justice confirm what the CPUC has already found – that virtually none of Pacific's recurring loop rates, recurring switching rates, or signaling and transport rates are the product of a cost study that complies with the Commission's TELRIC rules.[3] As explained by the CPUC, the permanent California rates that it adopted in 1998, using cost studies that relied on 1994 data, are now outdated and fail to reflect the substantial cost savings that have accrued to Pacific between 1994 and 2002.[4] And due to various "delaying" tactics employed by Pacific,[5] the CPUC is only in the incipient stages of addressing those non-TELRIC rates. California's transport and signaling rates continue to be based on 1994 costs and technologies, and the interim recurring loop and switching rates adopted by the CPUC as a stop-gap measure do not, as recognized by the CPUC, reflect even close to all of the cost reductions experienced by Pacific since 1994.[6] Given that many of Pacific's rates are either unchanged, or still near their original levels, it is

[3] *See, e.g.*, XO at 5-16, 32-33, AT&T at 11-30, DOJ Eval. at 7. The Comments further confirm the CPUC's finding that Pacific's non-recurring rates are inflated by a clear TELRIC error. *See* AT&T at 26-29.

[4] *See* CPUC Decision 99-11-050, at 168-169 (November 18, 1999) (recognizing that rates are based on the "the TELRIC costs we adopted [in 1998 and]. . . are based largely on data that has not been updated since 1994" and that "there is evidence that some of these costs may be changing rapidly"). Even Pacific has conceded that its cost studies are so old that they no longer can be made available to authorities for inspection. *See* CPUC Decision 02-05-042, Interim Rate Order at 8, 11-12 (May 22, 2002).

[5] SBC's chairman now has effectively admitted that it purposefully engaged in these delaying tactics. *See* Los Angeles Times, *For SBC's Chairman, a Distance to Go Ed Whitacre discusses the phone firm's frustrations as it seeks to expand in California* (October 28, 2002) ("Q: When California set new interim wholesale rates this year, regulators said you defied orders to provide them with cost data. So how can you now complain that current prices don't reflect your costs? A: I won't say we're totally blameless in this, but they have cost data now.").

[6] *See* AT&T at 17-18.

not surprising that there is virtually no UNE-based competitive entry in California.[7] As explained by the DOJ these "higher UNE price[s]" have in the past significantly contributed to the lack of UNE-based entry in California.[8]

It is Pacific's burden to *prove* that its California rates are within a range that a reasonable application of TELRIC principles would produce.[9] Pacific has not even seriously attempted to satisfy that burden, nor could it. The CPUC's express findings that substantial cost declines since 1994 have rendered the existing rates outdated conclusively demonstrates that Pacific's rates are no longer TELRIC-compliant. Indeed, as recognized by the D.C. Circuit, Pacific's reliance on "ancient rates" refutes any assertion of TELRIC compliance.[10] And given the CPUC's express recognition that Pacific's existing UNE rates reflect stale data and must be reformed, there is no possible reasoned basis for this Commission to conclude, based upon its own independent analysis of 1997 cost studies populated with 1994 data, that Pacific's current UNE rates are the product of a reasonable application of TELRIC.

The D.C. Circuit also has recognized that "fraudulent ILEC submissions" by an ILEC further refute any assertion of TELRIC-compliance.[11] Although the CPUC has not directly accused Pacific of making fraudulent submissions, the CPUC has recognized, and Pacific has conceded,[12] that Pacific's ancient rates remain in place today because of Pacific's delaying tactics. Specifically, as a starting

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[7] UNE-based residential line in California constitutes only 1.1% of all residential lines in California. DOJ at Eval. at 7. And UNE-based business lines in California constitute only about 1% of all business lines in California. DOJ Eval. at 7.

[8] *See id.*

[9] *See, e.g., Kansas/Oklahoma 271 Order* ¶ 29 ("the BOC applicant retains at all times the ultimate burden of proof that its application satisfies all of the requirements of section 271, even if no party files comments challenging its compliance with a particular requirement"); *New York 271 Order* ¶ 49 (the BOC applicant must make "a *prima facie* case that it meets the requirements of a particular checklist item" and "must plead, with appropriate supporting evidence, facts which, if true, are sufficient to establish that the requirements of section 271 have been met").

[10] *See WorldCom, Inc.* v. *FCC*, No. 01-1198, slip op. at 5 (D.C. Cir. October 22, 2002) (noting that "ancient rates UNE rates cannot serve as a benchmark").

[11] *Id.*

[12] *See* Los Angeles Times, *For SBC's Chairman, a Distance to Go Ed Whitacre discusses the phone firm's frustrations as it seeks to expand in California* (October 28, 2002) ("Q: When California set new interim wholesale rates this year, regulators said you defied orders to provide them with cost data. So how can you now complain that current prices don't reflect your costs? A: I won't say we're totally blameless in this, but they have cost data now.").

point for reexamination of Pacific's loop and switching rate elements, the CPUC ordered Pacific "to file switching and loop cost studies."[13] The CPUC emphasized that Pacific's cost studies should be capable of replicating [the original rates]," and that any cost model should comply with certain specified criteria, *i.e.,* the cost model should (1) show how costs were derived; (2) allow third parties to replicate the results; and (3) be capable of allowing inputs to be modified.[14] But Pacific intentionally refused to comply with that order. Instead, according to the CPUC, "Pacific has presented us with a black box that does not allow us to test the summary of evidence that initially persuaded the Commission to open the case. . . . The Commission must either trust Pacific's black box without further scrutiny, or delay the case while the [CPUC] . . . investigates other models or a revised model from Pacific."[15] Thus, Pacific's insufficient response to the CPUC's directives are directly responsible for the delay in implementing TELRIC-compliant rates in California.

In short, the CPUC's findings that Pacific's rates are based on substantially outmoded data, and the fact that Pacific fought to maintain those rates by intentionally filing cost studies that would delay the CPUC's attempt to update Pacific's rates, decisively establishes that Pacific's rates are not TELRIC-compliant, and eliminates any need for commenters to raise the myriad additional TELRIC issues in this proceeding. Nevertheless, the comments confirm that Pacific's rates also are inflated by multiple other clear TELRIC violations that preclude any finding that Pacific's rates comply with checklist item two.

DS1 & DS3 Rates. The comments identify the myriad respects in which Pacific's rates for DS1 and DS3 lines are inflated far above TELRIC levels. Foremost, as demonstrated by the comments of XO (at 5-16, 32-33), even though Pacific's California DS1 costs are the *lowest* of all of the SBC's affiliates, Pacific's DS1 and DS3 lines are between 18% and at least 55% *above* the already inflated

[13] *See WorldCom, Inc.* v. *FCC*, No. 01-1198, slip op. at 6.
[14] *Id.* at 7.
[15] *Id.* at 15.

Texas rates for those same elements, and also are far above SBC's rates in many other states.[16] That is because Pacific's rates are based on severely outdated data (vintage 1994), and are not computed based on proper forward-looking TELRIC principles.[17]

The comments further confirm that Pacific's rates for DS1 and DS3 preclude approval of Pacific's application for a second and independent reason: Pacific's inflated rates for these elements effect a price squeeze that forecloses competitive entry. The D.C. Circuit recently explained that the relevant inquiry for assessing the existence of a price squeeze is not whether input-purchasers were "absolutely precluded" from entry, but whether the "challenged conduct has exerted any anticompetitive effects."[18] And there is no question that Pacific's DS1 and DS3 rates have an anticompetitive effect. As explained by XO (at 13-14), Pacific's DS1 and DS3 rates often *exceed* the rates that Pacific charges its *retail* customers for those elements, making it virtually impossible for competitors to compete against Pacific for those customers. Pacific's overstated DS1 and DS3 rates also substantially inflates the costs of providing other telecommunications services that rely on DS1 and DS3 lines. Thus, Pacific's overstated DS1 and DS3 rates effect an anticompetitive price squeeze that makes them unlawfully discriminatory and confirms that a grant of the application would be contrary to the public interest.

Vertical Features. Pacific's switch rates are inflated by a non-TELRIC charge for vertical features (*e.g.*, "caller ID," "three way calling" and "call forwarding"). Pacific, unlike the incumbent

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[16] *See* XO at 10-11.

[17] *See* AT&T at 17-18; XO at 12-13. In addition, as noted by XO (at 6), Pacific's claim that the CPUC has carefully scrutinized and blessed Pacific's DS1 and DS3 rates is wrong. In reality, the CPUC determined that "the costs of this [DS3] UNE were never examined in the prior OANAD proceeding using forward-looking, TELRIC analysis." *Scoping Memo For Consolidated 2001/2002 Unbundled Network Element (UNE) Reexamination For Pacific Bell Telephone Company*, CPUC proceeding A.01-02-024/A.01-02-035, at 6-7 (June 12, 2002). Pacific's DS3 loop were set using Pacific's DS3 *entrance facility* rates as a proxy for the DS3 loop rates. According to CPUC, however, "the underlying costs used to set a price for [entrance facilities] were not reliable." *Id.* Thus, because the CPUC has expressly found Pacific's DS3 Entrance facility rates were not based on TELRIC principles, it follows that Pacific's DS3 loop rates – which are based on those DS3 entrance facility rates – also were never based on TELRIC principles.

[18] *See WorldCom, Inc.* v. *FCC*, slip op. at 8 (quoting *Anaheim* v. *FERC*, 941 F.2d 1234, 1238 (D.C. Cir. 1991)) (internal quotations omitted).

provider in most other states, charges competitive LECs a separate fee for *each vertical feature*. Such costs are inappropriate because today's modern switches include most vertical features, which can be activated simply by "turning on" those features.[19] Thus, to justify these separate costs, Pacific has actually artificially created costs that would not exist, but for Pacific's unique costing methodology.[20] As an example, Pacific's vertical features charges include recovery of the costs for managing and billing each of the individual feature "products."[21] Given that such feature related expenses only exist because Pacific insists on billing each single feature separately, Pacific's rates which reflect those expenses are plainly inflated above TELRIC levels.[22] Indeed, such feature-related expenses simply do not exist in other jurisdictions because the other BOCs, including SBC's other affiliates do not treat vertical features as separate products that need to be "managed" or billed.[23]

Worse yet, Pacific does not impute to itself any costs associated with "managing" or "billing" its vertical features.[24] That creates yet another a classic unlawful price-squeeze opportunity. Although UNE-based competitors in California must pay managing and billing expenses for each feature in California, Pacific generally does not.[25] Consequently, Pacific's costs of vertical features are artificially lower than those of its competitors, which provides Pacific with an artificial competitive advantage.[26] Pacific can use that advantage to provide vertical features at prices below its competitors costs, and provides Pacific with additional revenues that it can use to unfairly compete against other local carriers. Thus, Pacific's arbitrary separate charges for each vertical features is both a clear

[19] *See* AT&T at 27-28; Murray Decl. ¶¶ 8-11.
[20] *See* Murray Decl. ¶ 8-11.
[21] *See id.*
[22] *See id.*
[23] *See id.*
[24] *See* Murray Decl. ¶ 8-11.
[25] *See id.*
[26] *See id.*

checklist violation and evidence that a grant of Pacific's application would contravene the public interest.

Non Recurring Charges. The CPUC expressly found, in December of 1998, that Pacific's NRCs recover "[s]o called 'loaded' recurring costs represent[ing] approximately 25% of the total costs for NRCs."[27] The CPUC further noted that "[w]e are well aware that the FCC's August 8, 1996 First Report & Order that prohibited ILECs from recovering recurring costs in NRCs, but that requirement has been stayed by the Eighth Circuit. Should the Supreme Court reverse the Eight Circuit's stay of pricing provisions of the First Report & Order, we will direct Pacific . . . to remove [the NRCs] . . . from their nonrecurring cost studies."[28] The Supreme Court has now reversed the Eight Circuit's stay of the pricing provisions of the *First Report & Order*, but the CPUC has not required Pacific to remove the recurring costs from its NRCs.[29] Thus, Pacific's NRCs continue to be inflated above TELRIC levels by approximately 25%.

B. Texas Rates Are Not A Valid Benchmark.

Unable to defend the California rates on the merits, Pacific attempts a perverted application of the Commission's benchmarking short cut. According to Pacific, the Commission can ignore the clear TELRIC violations that inflate the California rates, because those rates are within a reasonable range of SWBT's Texas rates.[30] But SWBT's Texas rates are not a valid benchmark because, like Pacific's California rates, SWBT's Texas rates are inflated far above current TELRIC levels.[31] The Commission's Synthesis Cost Model and SBC's reported data both independently confirm that the Texas recurring switching and loop rates are inflated by at least 25-30 percent over current forward-

[27] CPUC Decision 98-21-079, at 49 (December 17, 1998).

[28] *Id.* at 53.

[29] *See* Murray Decl. ¶ 6.

[30] *See* Application at 31-33.

[31] *Pennsylvania 271 Order* ¶ 67 ("[w]ithout a finding of TELRIC compliance for the benchmark state, a comparison loses all significance.").

looking costs.[32] And the Texas Public Utilities Commission ("TPUC") has recognized that Pacific's rates are in dire need of an update, citing the substantial changes in SWBT's Texas network since 1997 as "sufficiently compelling" evidence to "merit an investigation" of SWBT's Texas rates.[33] In this regard, for example, AT&T's has demonstrated that TELRIC-compliant cost studies produce loop rates for Texas that are about a third of SWBT's current Texas rates.[34]

As explained by the Commission, any ruling that simply presumed that the rates in a section 271 approved state automatically establish TELRIC-compliance for benchmarking purposes would be inappropriate and unlawful because it would "forever freeze TELRIC ratemaking to the first TELRIC rate proceeding and *de facto* fail to recognize increased sophistication in modeling or newly available evidence that could produce different, more precise TELRIC refinements that result in increased or decreased wholesale prices for UNEs."[35] In fact, the D.C. Circuit recently confirmed that "[i]n a market with falling costs, ancient UNE rates cannot serve as a valid benchmark,"[36] and that it would be reversible error if the Commission "sufficiently disregarded the issue of the rate's age so as to adopt rates that were unreasonably outdated."[37]

Indeed, the D.C. Circuit's *Massachusetts 271 Appeal Decision* confirms that the Commission must reject Pacific's attempt to rely upon a Texas benchmark. In that case, WorldCom challenged Verizon's reliance upon a New York benchmark to justify its Massachusetts rates. WorldCom argued that the New York benchmark had "become radically detached from TELRIC" as a result of, *inter alia*, "the age of the rates."[38] The Court expressly recognized that "[a]t some point, WorldCom's argument plainly must become a winner" – "ancient UNE rates cannot serve as a valid benchmark" and it "is

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[32] *See* AT&T at 20-22; Lieberman/Pitkin Decl., Tables 1 & 2.

[33] *Texas 2002 Arbitration Order* at 110.

[34] *See* Confidential Testimony of Steven E. Turner, CPUC Docket No. 25834 (filed by AT&T on November 4, 2002). This document has been filed subject to a state protective order because it reflects information that SWBT deems proprietary.

[35] *Rhode Island 271 Order* ¶ 46.

[36] *See WorldCom, Inc.* v. *FCC*, slip op. at 5.

[37] *See id.* at 6.

surely right . . . that a challenger might tender evidence of benchmark unreasonableness so strong as to preclude FCC approval without a hearing" on the reasonableness of the rates tendered as benchmarks.[39] AT&T and other commenters have tendered just such evidence here – *i.e.*, that regardless of the measure, SWBT's Texas rates are vastly above current TELRIC levels. Absent compelling evidence that AT&T's showing is erroneous and that SWBT's Texas rates are, in fact, consistent with current TELRIC levels – and SWBT has offered no such evidence – it would plainly be arbitrary to allow Pacific to evade scrutiny of its own rates in reliance upon a Texas benchmark. As the Court stressed, if the Commission is to rely upon benchmark comparisons, "the record" must show that "the FCC reasonably concluded that it had, in light of [commenters'] claims and proffered evidence, reasonable grounds to be satisfied that the disputed [benchmark] rates were unlikely to exceed the range of TELRIC compliance."[40]

No such reasonable grounds are present here. Although the court of appeals recognized that "mere age" does not alone make a rate an invalid benchmark, here there is conclusive evidence that severe and indisputable cost declines have, *in fact*, made the Texas rates "unreasonably outdated" – including evidence that the Texas PUC has determined that the Texas rates are outdated, that SWBT's own data shows that its Texas rates fail to reflect cost declines that have occurred since the rates were adopted, and that the Commission's Synthesis Model shows that Pacific's rates fail to reflect those cost declines. By contrast, in Massachusetts the Commission faced far less evidence that the New York rates were outdated.[41]

Moreover, the unique circumstances that allowed the Commission to rely upon "the state's own processes of rate revision and correction" plainly are not present here. The principal challenge to using New York as a benchmark was not the age of the New York rates, but allegations that Verizon had

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[38] *Id.*

[39] *Id.* at 5.

[40] *Id.* at 6.

blatantly misrepresented its switching costs. At the time of the Massachusetts 271 proceeding, the Commission, the state commission and the court had all recognized that if these allegations were proven to be true, the New York rates would have to be reduced, and, indeed, the New York Public Service Commission ("NYPSC") had almost completed a UNE rate proceeding that all recognized would substantially reduce virtually every UNE rate in New York. Recognizing these unique facts, the Commission approved the Massachusetts rates (which were essentially equal to the existing inflated New York rates) with the express warning that the Commission would reconsider that approval if the Massachusetts commission did not lower Massachusetts rates after the NYPSC had done so. The Commission explained that "a decision by the New York Commission to modify these UNE rates may undermine Verizon's reliance on those rates in Massachusetts and its compliance with the requirements of section 271."[42] And, by the time the court rendered its decision, the Massachusetts commission had, in fact, reduced rates to the new, much lower levels. Here, in contrast, the TPUC only just *began* the process of developing new UNE rates, the CPUC still is wrestling with Pacific's various delaying tactics as it tries to update Pacific's California rates, and Pacific has made no promise to reduce its rates to levels that Texas ultimately determines are appropriate. To the contrary, Pacific proposes to double many of the California rates.

There also are other important distinctions between the Massachusetts section 271 proceeding and the California section 271 proceeding. In the Massachusetts proceeding, the Commission expressly determined that New York and Massachusetts had substantially similar rate structures and geographic characteristics.[43] The record in this proceeding, however, shows that there are substantial *differences* in the rate structure and geographic characteristics between California and Texas.[44] For example, Pacific's California rates include a non-TELRIC-compliant vertical switching fee for each

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[41] *See Massachusetts 271 Order* ¶¶ 31-33.
[42] *Id.* ¶ 30.
[43] *See id.* ¶ 24.

vertical feature, whereas SWBT recovers those rates through recurring rates. And California's service areas are much more dense than those in Texas.[45]

In short, Texas is not even remotely a valid benchmark state for assessing California's rates. The Texas rates satisfy *none* of the Commission's criteria for choosing a benchmark state: (1) SWBT's Texas rates are not TELRIC-compliant; (2) SWBT's Texas rates have a substantially different rate structure that Pacific's California rates; (3) Texas and California have very different geographic characteristics that affect the costs of providing telephone service; and (4) the California and Texas were served by different BOCs when rates were adopted in each of those states.[46] Accordingly, Pacific cannot rely on the Commission's shortcut method for establishing TELRIC-compliance, using Texas rates as a benchmark, but must demonstrate that the California rates are based on cost studies that comply with the Commission's TELRIC methodology. As demonstrated by the comments, however, Pacific has not made, and cannot make, such a showing.

C. The Fact That Pacific's Interim Switching And Loop Rates Are Subject To True-Up Does Not Satisfy Checklist Item Two.

In a final attempt to circumvent the fact that it has not yet implemented TELRIC-compliant rates in California, Pacific argues that the existence of TELRIC-compliant rates is unnecessary for approval of its section 271 application because Pacific has agreed to true-up its recurring loop and switching rates to the switching rates established by the CPUC in the ongoing permanent rate proceedings in California. But the Commission has relied on a true-up mechanism only in very limited circumstances, *i.e.*, where the true-up arrangements were limited to a small subset of the applicants

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[44] *See* AT&T at 24-26; Lieberman/Pitkin Decl. ¶¶ 17-20.

[45] *See* AT&T at 24-26; Lieberman/Pitkin Decl. ¶¶ 17-20. In addition, the Commission had approved the New York rates after those rates had been litigated in the New York section 271 proceeding only a year before Verizon proposed to import those rates into Massachusetts. In this proceeding, by contrast, SWBT's Texas rates were not for the most part litigated in the Texas section 271 proceeding, the Texas application was approved well over *two* years ago, and Pacific is not proposing to import rates from Texas.

[46] *See* AT&T at 23-26.

UNEs.[47] As explained by the Commission's *Arkansas/Missouri 271 Order* (¶ 64), reliance on a true-up was appropriate in that case because not all "UNE-P rates [were] . . .interim, and the vast majority of interim recurring rates . . . [were] zero."[48] Here, by contrast, the true-up mechanism in California leaves undetermined all recurring loop and switching rates, which are the most important (and costly) components of the UNE platform.

Even worse, Pacific is now threatening to saddle CLECs with massive costs associated with the true-up mechanism. In the ongoing UNE rate proceeding in California, Pacific has proposed to nearly double the current loop rates and to *increase* switching rates by 43%. That means that potential new entrants must plan for the possibility that they could ultimately be forced to fork over large sums of money to Pacific pursuant to the true-up mechanism. Such extraordinary uncertainty clearly chills competitive entry, and precludes any finding that Pacific has fully implemented its checklist obligation to make unbundled network elements available at cost-based rates, and that a grant of the application is in the public interest.[49]

Pacific's promise to limit any retroactive true-ups to SWBT's Texas rates does not alleviate that substantial uncertainty. As an initial matter, CLECs have no idea how such true-ups will be computed, because Pacific has not explained whether the true-up will be based on the Texas rates produced by the ongoing Texas UNE rate proceeding, or on SWBT's existing Texas rates. As explained by the DOJ (at 8):

> [I]t is not clear which Texas rates will be reflected in SBC's true-up calculations if the Texas PUC revises its rates pursuant to its pending cost proceeding during the period interim rates are in effect in California. Conceivably, SBC's proposal could have the effect of altering the Commission's approach to cross-state comparisons of rates. At the very

[47] *New York 271 Decision* ¶ 258 ("Uncertainty will be minimized if the interim rates are for a few isolated ancillary items"); *See Georgia-Louisiana 271 Decision* ¶ 91 (accepting true-up proposal for DUF rates). Notably, in the Georgia proceeding, BellSouth's offered a true-up to DUF rates that were guaranteed to be *less* than the rates in BellSouth's application, because BellSouth itself had proposed lower DUF rates in Georgia. By contrast, Pacific has submitted much higher rates in California, which means that the true-up may impose a large cost on Pacific's competitors.

[48] *Arkansas/Missouri 271 Order* ¶ 64.

[49] *See* AT&T at 29-30.

> least, the ambiguity of the proposal invites unnecessary future debate over such issues.[50]

To the extent that the true-ups will be based on Pacific's existing TELRIC rates, that mechanism offers no protection to potential new entrants. As noted, the existing Texas rates are themselves far above current TELRIC levels, and "promising" CLECs that they will "only" have to pay true-ups to the inflated Texas rates therefore does not alleviate the chilling effects associated with those looming true-up payments.

Furthermore, the uncertainty relating to Pacific's true-up mechanism is not limited to which rates will apply. Pacific also has not explained how it will address the different rate structures in California and Texas to compute true-ups. For example, will the loop true-up be based on state-wide average loop rates or on zone-by-zone loop rates? Will the switching true-up be based on California or Texas usage characteristics, or some combination thereof? In this regard, the differences between California and Texas that make Texas an inappropriate benchmark state also make create confusion as to how a true-up mechanism that is tied to the Texas rates can or will be applied.

Finally, Pacific's true-up mechanisms will do nothing to address Pacific's other inflated rate elements. As noted, for example, the CPUC has determined that Pacific's transport and signaling rates continue to be overstated because they are based on hopelessly outdated 1994 data. But Pacific has introduced no true-up mechanism to compensate ratepayers for those overstated rates. Thus, even if the Commission could ignore the clear TELRIC errors that inflate Pacific's recurring switching and loop rates based on a true-up, it could not ignore the clear TELRIC errors that inflate Pacific's other rates.

On this record, it is clear that Pacific's true-up mechanism is not a legitimate substitute for setting and implementing rates that comply with the Commission TELRIC rules. Thus, Pacific's Application must be rejected.

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[50] DOJ Eval. at 8.

II. THE COMMENTS CONFIRM THAT PACIFIC FAILS TO PROVIDE NONDISCRIMINATORY ACCESS TO ITS OSS.

The comments confirm that Pacific has not met the Commission's two-part test for determining whether a BOC has complied with its OSS obligations under the competitive checklist.[51] As AT&T has previously shown, Pacific has not met the Commission's requirement that it provide CLECs with interfaces that allow equivalent access to OSS functions, and with the assistance necessary to use those interfaces. In addition, Pacific has not shown that its OSS are operationally ready, as a practical matter.[52]

A. The Comments Confirm That Pacific's OSS Fail To Satisfy Checklist Item Two.

Pacific has clearly failed to provide CLECs with the interfaces and assistance required to satisfy the first prong of the Commission's test. Pacific, for example, continues to deny CLECs equivalent access to OSS functions by failing to give CLECs the same access to "alternative community names" (which customers can, and do, request for inclusion in their directory listings) as that enjoyed by its retail operations.[53] Pacific implemented a "fix" on October 9, 2002, which was purportedly designed to prevent the order rejections that AT&T was experiencing due to the refusal of Pacific to provide access to its database containing information regarding alternative community names. However, the "fix" has not been shown to be fully effective. Even with the implementation of the "fix," some of AT&T's orders are still being rejected for failure to use an alternative community name.[54] Like other order rejections, these rejections require AT&T to expend additional time and costs that Pacific's retail operations do not incur.[55]

The "flat file" of alternative community names that Pacific has provided to AT&T does not compensate for this lack of parity. Regardless of whether the customer is migrating to the CLEC from

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[51] AT&T at 37-44; Mpower at 3, 5-8; Vycera at 9-12.
[52] AT&T at 37-44.
[53] *See id.* at 38-39.
[54] Willard Reply Decl. ¶¶ 4-5.
[55] AT&T at 39; Willard Reply Decl. ¶ 6.

Pacific or is taking local exchange service for the first time in California, the "flat file" is inadequate to resolve the problem. First, rather than set forth the alternative community name, the flat file simply provides abbreviations, which may not be readily identifiable to the CLEC's service representative who is handling the customer's order (particularly if the representative is not a California resident). Second, Pacific has failed to provide CLECs with adequate instructions and guidelines regarding the use of such names in the ordering of new accounts.[56] In addition, when a customer is migrating to a CLEC, the "flat file" does not enable the CLEC to determine whether that customer is currently using an alternative community name in its directory listing.[57]

Pacific has also failed to meet the first prong of the Commission's test because it has not provided the assistance that CLECs need to use its interfaces. Pacific's test environment does not meet the Commission's requirement that it mirror the production environment, because: (1) the test environment does not allow CLECs to perform mechanized testing for accounts in Southern California; and (2) the test environment does not enable CLECs which, like AT&T, are still operating under LSOG 3.06 to test the production environment that will occur after they migrate to LSOG 5. AT&T at 40-41.

With respect to the first of these deficiencies in its test environment, Pacific has rationalized that "a CLEC that submits an LSR into the test environment with a BAN for the Southern region, but an address for the Northern region, will receive the appropriate reject message."[58] Pacific, however, misses the point. CLECs need to conduct testing to determine not only whether an order with a particular BAN for a particular NPA/NXX will be rejected in actual production, but how it can submit the order successfully through Pacific's systems *without* rejection, on the first try. That is particularly

[56] AT&T at 39 & n.118 & Willard Opening Decl. ¶¶ 17, 20.
[57] AT&T at 39 & Willard Opening Decl. ¶ 17.
[58] Huston/Lawson Aff. ¶ 245.

the case in California, where one LATA overlaps both regions – and NPA/NXXs in that LATA will have different BANs, depending on the region in which they are located.[59]

Without the ability to determine in testing what BAN should be included on the order, a CLEC will be relegated to experiencing constant rejections in production – resulting in an increase in costs and creating the risk of delays in provisioning.[60] Such a result is totally contrary to the purpose of requiring that the test environment mirror production.[61]

The inability of CLECs to perform mechanized testing from accounts in Southern California is but one example of the ways in which the test environment does not mirror a production environment – as AT&T's recent experience with Pacific's test environment demonstrates. When AT&T submitted orders in the test environment to migrate certain existing AT&T customers from service through the UNE-P to service through UNE loops, and included the customer's directory listing information on the orders, the orders were accepted and processed in the test environment, without being rejected. By contrast, when AT&T submitted UNE-P to UNE-L migration orders containing directory listing information in actual commercial production last month, the orders were rejected. Only after experiencing these rejections did AT&T learn that Pacific's business rules call for rejections of migration orders in these circumstances. In response to AT&T's inquiries about this problem, Pacific has acknowledged that the results in the two environments differed even though the input data in the production orders "resembles what was previously sent in [the] test."[62] The problem caused by the test

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[59] AT&T at 40.

[60] *See* AT&T at 40-41 & Willard Opening Decl. ¶¶ 39-42.

[61] *See Georgia/Louisiana 271 Order* ¶ 187 ("A stable testing environment that mirrors the production environment and is physically separate from it is a fundamental part of a change management process ensuring that *competing carriers are capable of interacting smoothly and effectively with a BOC's OSS*") (emphasis added). The Commission has recognized the need for CLECs to be able to determine through testing how to avoid order rejections in production, stating that "a testing environment that mirrors production avoids 'a competing carrier's transactions succeeding in the testing environment but failing in production'." *Id.* (quoting *Texas 271 Order* ¶ 132).

[62] Willard Reply Decl. ¶¶ 7-10.

environment's failure to reflect actual production experience have impaired and delayed AT&T's strategy of providing local exchange service through its own facilities.[63]

Pacific also fails to provide CLECs with adequate technical assistance and help desk support. Pacific has created confusion among the CLECs as to which of its various centers they should contact to resolve particular problems, because Pacific has never clearly delineated the division of responsibilities among those centers.[64] Recently, Pacific's Account Manager for AT&T advised AT&T that it should contact Pacific's IS Call Center, rather than the MCPSC, for assistance in resolving problems that AT&T was encountering in obtaining telephone reservations using the CORBA pre-ordering interface. This represented yet another reversal of Pacific's position regarding the responsibilities of the MCPSC (which Pacific's documentation had described as responsible for issues involving CORBA transactions).[65] The inconsistent statements by Pacific simply compound the confusion already created and require AT&T to change, yet again, its methods and procedures.[66]

Finally, as a recent *ex parte* letter by Pacific confirms, Pacific does not satisfy the second part of the Commission's two-part OSS test because it cannot show that its OSS are operationally ready, as a practical matter.[67] Pacific recently acknowledged that no commercial data exists by which the Commission can meaningfully evaluate the performance of its OSS in handling UNE-P orders submitted via its EDI ordering interface. In a recent letter to the Department of Justice describing the monthly volumes of UNE-P service orders by interface between July and September 2002, Pacific stated that "The EDI service orders were created from LSRs sent on the LSOR 3.06 version" – not

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[63] Willard Reply Decl. ¶¶ 7,11.

[64] AT&T at 42.

[65] Willard Reply Decl. ¶¶ 13-15. When AT&T attempted to reserve telephone numbers for customers served by certain of Pacific's switches in California, it received a response stating, "No telephone numbers available." SBC ultimately advised AT&T that the problem was occurring because SBC had not properly set the parameter ("TCAT") in these California switches. By contrast, SBC found that the problem did not occur in switches in the SWBT region, and in only a small number of switches in the Ameritech region. SBC advised AT&T that, to correct the problem in California, it would reset all of its California switches to ensure that the "TCAT" parameter is properly set. Willard Reply Decl. ¶ 14 n.4.

[66] *Id.* ¶ 15.

[67] *See* AT&T at 43-44.

under LSOG version 5.00 or LSOG version 5.01.[68] The absence of data regarding orders submitted via the EDI interface under LSOG 5 is a critical deficiency, because LSOG 5 is the release that SBC's most substantial competitors may be expected to use.[69] SBC cannot compensate for this gap by relying on the third-party testing of its OSS, because the third-party testing failed to evaluate adequately the ability of the OSS to handle UNE-P orders through *any* version of the EDI ordering interface.[70]

B. Pacific's Performance Data Do not Show Checklist Compliance.

The comments confirm that Pacific's own inadequate performance results demonstrate that Pacific has fallen far short of its statutory obligations to "provide access that is equal to . . . the level of access that the BOC provides" to its retail customers and to offer CLECs a "meaningful opportunity to compete."[71] Pacific's own data – including the data it most recently submitted for September, 2002 – confirm that Pacific continues to provide better service to its own customers than it does to CLEC customers, and that this discriminatory treatment is particularly evident in Pacific's provisioning and maintenance and repair of UNE-P and UNE loop orders.

For example, the comments show that, during the provisioning process, Pacific places more CLEC orders in jeopardy than its retail orders and then exacerbates these deficiencies by failing to

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[68] *See* letter from Cynthia J. Mahowald (SBC) to Susan Wittenberg and Lauren Fishbein (DOJ), dated October 16, 2002, at 1 (attached to *ex parte* letter from Conin Stretch (Pacific) to Marlene H. Dortch, dated October 17, 2002). By contrast, Pacific stated that the UNE-P service orders submitted via its LEX interface were created using LSOR version 5.00 or 5.01. *Id.* As AT&T has previously demonstrated, the use of LEX cannot serve as a suitable surrogate for EDI, which (unlike LEX) is designed for submission of mass volumes of orders but also is developed jointly by Pacific with the CLEC. AT&T at 44-45 n.136 & Willard Opening Decl. ¶ 52.

[69] AT&T at 44 & Willard Opening Decl. ¶ 48.

[70] AT&T at 44. SBC's recent letter to the Department of Justice suggests that the testing of the EDI interface using the LSOR 5.00 version is sufficient to demonstrate the operational readiness of the OSS to handle EDI UNE-P orders submitted under LSOG 5. Letter from Cynthia J. Mahowald, *supra*, at 2. Any reliance by SBC on Nightfire's testing, however, is misplaced. First, as Nightfire admits, Nightfire is not a real-life CLEC, but "a software and services company within the telecommunications industry." Saifullah Aff. ¶ 1. Furthermore, contrary to SBC's suggestion, Nightfire was not an "independent third party" tester, but was retained directly by SBC. SBC Br. at 39-40; Saifullah Aff., Att. A at 19. Most importantly, Nightfire conducted only "integration testing," which examined whether the parsed data that Pacific returned in response to pre-ordering queries could be auto-populated onto CLEC orders without manual intervention. *Id.*; Huston/Lawson Aff. ¶¶ 141-147. Although the integratability of pre-ordering and ordering functions is critically important to the CLECs' ability to compete, it represents only one of many indicators of the operational readiness of the OSS.

[71] *Connecticut 271 Order,* Attach. D, ¶ 5; *Georgia/Louisiana 271 Order* ¶ 219.

issue timely missed commitment notices to CLECs.[72] To make matters worse, far too often, Pacific misses more due dates for CLEC customers than for its own retail customers.[73]

The comments also show that the quality with which Pacific provisions CLEC orders is subpar. In this regard, Pacific fails to meet performance standards when resolving provisioning troubles reported by CLECs prior to service order completion. Notably, even after service order completion, CLEC customers encounter more provisioning troubles than those reported by Pacific's retail customers during the initial 30 day installation period.[74]

Even more disturbing is Pacific's abysmal performance in the area of maintenance and repair. The DOJ in its evaluation correctly points out that the CPUC, on the basis of 2001 commercial data, expressed grave reservations as to whether Pacific's performance in the area of maintenance and repair provides CLECs with "'a meaningful opportunity to compete.'"[75] The DOJ's evaluation indicates that the CPUC's concerns were and are well-founded. In that connection, the DOJ notes that Pacific's September 2002 data in its October 28 *ex parte* provide further confirmation that Pacific's performance in the area of maintenance and repair "warrants scrutiny" by the Commission.[76] The DOJ is correct. Pacific's September results are littered with examples of chronic and unstable performance. As the DOJ aptly observes, Pacific's September results undercut its claims of exemplary "maintenance and repair performance pertaining to the UNE-platform and UNE loops."[77] In bolstering its observation, the DOJ notes that Pacific's September maintenance and repair results for several measures show poor performance for UNE-P orders, and that Pacific's "performance in maintaining and repairing UNE loops for CLECs has been uneven."[78]

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[72] Toomey/Walker/Kalb Decl. ¶¶ 58-60; XO at 16.
[73] Toomey/Walker/Kalb Decl. ¶¶ 65-66; XO at 17.
[74] Toomey/Walker/Kalb Decl. ¶¶ 75-76 79; XO at 17.
[75] DOJ Eval. at 3 n. 10.
[76] *Id.*
[77] *Id.*
[78] *Id.*

Worse yet, these performance failures have occurred notwithstanding Pacific's promises of corrective steps that would improve performance.[79] As a matter of law, these "paper promises" are entitled to no weight in the context of these proceedings.[80] As one commenter correctly observes, Pacific's recent reported results show that "the trend appears to be that of poorer service, not improvement,"[81] and Pacific's September performance results confirm that discriminatory trend. Pacific should not be granted interLATA authorization until it fulfills its promises and its legal obligation to provide nondiscriminatory access to its OSS.

1. Provisioning

In order to demonstrate statutory compliance, Pacific must show that it is provisioning CLEC orders within the same amount of time and with the same degree of quality that it provisions the same or comparable services for its retail customers.[82] Pacific's own data show that it has failed to do so.

Jeopardies. Measure 5, which is governed by a parity standard, measures the percentage of orders that are placed in jeopardy. The comments confirm that Pacific places more CLEC orders at jeopardy than those for its retail customers. As XO correctly observes, Pacific "placed more CLEC DS1 loop orders in jeopardy than retail orders in June, July and August."[83] This disturbing trend continued in September. In September, although 0.11 percent of Pacific's retail orders were placed in jeopardy, 1.16 percent of CLEC DS1 loop orders were placed in jeopardy.[84]

An examination of Pacific's data in its Application, coupled with its most recent September results, reveal that during the past two months Pacific has placed more UNE Loop Digital IDSL capable orders at jeopardy than retail orders. In August, 5.27 percent of Pacific's retail orders were

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[79] *See* DOJ Eval. at 3 n. 10 (citing Motta Aff. ¶¶ 33-44, 50-51 discussing Pacific's various remedial steps that have been implemented to improve maintenance and repair performance).

[80] *Michigan 271 Order* ¶ 55 (noting that "[p]aper promises do not, and cannot satisfy a BOC's burden of proof").

[81] XO at 17.

[82] *New York 271 Order* ¶ 196; *Connecticut 271 Order*, Attach. D ¶ 38.

[83] XO at 17 (footnote omitted).

[84] Letter from Colin Stretch to Marlene H. Dortch dated October 28, 2002, attaching performance results through September 2002. ("October 28 *ex parte*"), Measure 5 (524100).

placed in jeopardy, while 9.08 percent of UNE Loop Digital IDSL capable orders were placed in jeopardy. In September, 4.38 percent of Pacific's retail orders were placed in jeopardy, while 6.33 percent of the UNE Loop Digital IDSL capable orders were placed in jeopardy.[85]

Pacific's data show that it not only places more CLEC orders at jeopardy than its own retail orders, but that it compounds these errors by failing to notify CLECs in a timely manner of missed commitments. Pacific's data show repeated failures in meeting the 95 percent benchmark standard that has been established for Measure 6 which measures, *inter alia*, the timeliness of missed commitment notifications. These chronic performance failures are evidenced in its results for UNE loop, UNE P, and Resale POTS orders.

For example, during May, June, August, and September 2002, Pacific failed the 95 percent benchmark standard for issuing timely missed commitment notices for UNE Loop 2 Wire Digital IDSL capable orders.[86] During June, August, and September 2002, Pacific failed to meet the benchmark standard for issuing timely missed commitment notifications for UNE Loop 2/4 (8db and 5.5db) weighted 2/4 wire analog orders.[87] Additionally, from May through September 2002, Pacific consistently failed to satisfy the benchmark standard for issuing timely missed commitment notices for UNE-P orders.[88] Furthermore, from May through September 2002, Pacific failed to meet the benchmark standard for issuing missed commitment notices for Resale Residential POTS orders.[89]

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[85] *Id.*, Measure 5 (523300).

[86] Toomey/Walker/Kalb Decl. ¶ 60; October 28 *ex parte,* Measure 6 (650001). During September, only 85.71 percent of the missed commitment notices for this product category were issued in a timely manner.

[87] October 28 *ex parte*, Measure 6 (650200). For example, in September, only 89.13 percent of the missed commitment notices for this product category were timely.

[88] Toomey/Walker/Kalb Decl.¶ 59; October 28 *ex parte,* Measure 6 (652000). For example, in September, only 63.78 percent of the missed commitment notices for UNE-P orders were issued within the requisite notice interval. Significantly, these performance failures in Pacific's September UNE-P results underscore that Pacific's commitment to resolve these performance deficiencies by reprogramming its Decision Support Systems remains unfulfilled. Toomey/Walker/Kalb Decl. ¶ 59

[89] October 28 *ex parte,* Measure 6 (648500). During September, only 82.05 percent of Pacific's missed commitment notices for Resale Residential POTS orders met the standard notice interval – a rate well below the 95 percent standard.

Pacific's persistent and repeated performance failures are inexcusable. When Pacific fails to meet the committed due date and notify the CLEC, the CLEC will undoubtedly learn of these lapses in performance when it is contacted by its irate customers. Worse yet, when Pacific fails to provide timely status notices to CLECs, the CLECs lack sufficient information to address the customer's concerns.[90]

Missed Due Dates. This Commission has held that data on missed due dates are "probative in assessing whether an incumbent LEC processes and completes orders from competing carriers in the same time frame in which it processes and completes its own retail orders."[91] The comments and Pacific's most recent data confirm that Pacific gives preferential treatment to its retail orders and discriminates against CLEC loop orders when meeting installation due dates.

Pacific's performance in this area is captured in Measure 11 (% Due Dates Missed). The comments show that "Pacific failed to achieve parity with respect to Due Dates for CLEC DS1 loop orders for the North region in June and July, two of the four months reviewed (in the Application), or 50% of the time."[92]

The data Pacific' included in its Application, combined with its most recent reported results for September, reveal other examples of Pacific's preferential treatment to retail customers in meeting committed due dates. In June and September 2002, Pacific failed Measure 11 in its provisioning of UNE Loop 2 wire Digital IDSL capable orders in the Southern region.[93] In June 2002, Pacific missed 1.49 percent of the due dates for its retail orders. In stark contrast, Pacific missed 5.49 percent of the due dates for UNE Loop 2 wire Digital IDSL capable orders.[94] Similarly, in September, Pacific

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[90] Walker/Toomey/Kalb Decl. ¶ 58.

[91] *New York 271 Order* ¶ 194.

[92] XO at 17 (footnote omitted). *See also* Toomey/Walker/Kalb Decl. ¶ 65 (discussing performance failures for Submeasure 11-10901 (Percent of Due Dates Missed-North UNE Loop 4 wire Digital 1.544 mbps capable/HDSL).

[93] October 28 *ex parte*, Measure 11 (1122604).

[94] *Id.*

missed the due dates on 0.66 percent of its retail orders, but 3.15 percent of UNE Loop 2 wire Digital IDSL capable orders.[95]

Furthermore, because Pacific discriminates in the assignment of facilities, its own performance results for Measure 12 (% Missed D/D – Lack of Facilities) show that it has missed a greater percentage of due dates for CLEC orders than those for its retail customers. From July through August 2002, Pacific failed Measure 12 for UNE Loop 2 wire Digital IDSL capable orders in the Los Angeles region.[96] Pacific's September results show that Pacific missed no due dates on any of its retail orders, but missed the due dates on 1.80 percent of UNE Loop 2 wire Digital IDSL capable orders in Los Angeles.[97]

Furthermore, in September 2002, Pacific failed Measure 12 for UNE Loop 2 wire Digital IDSL capable orders in Pacific's Southern region.[98] During September, Pacific missed the due dates on 0.33 percent of its retail orders, as opposed to 2.36 percent of UNE Loop 2 wire Digital IDSL capable orders in the Southern region.

Completion Intervals. This Commission has found that data on average installation intervals are "fundamental to any showing of nondiscriminatory performance in support of a Section 271 application."[99] Pacific's data show that it does not provision interconnection trunks at parity. During two of the past four months for which data have been reported, Pacific has failed Measure 7 (Average Completion Interval) in its provisioning of interconnection trunks in the Southern region. In June 2002, Pacific completed ILEC dedicated trunks in 9.44 business days, but took 20.21 business days to provision interconnection trunks. In September, Pacific took 17.77 business days to provision ILEC

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[95] *Id.*

[96] *Id.*, Measure 12 (1215701) (LA).

[97] *Id.*

[98] October 28 *ex parte*, Measure 12 (1221101) (South).

[99] *Michigan 271 Order* ¶¶ 164, 185, 212.

dedicated trunks, but took 19.04 business days to provision interconnection trunks in the Southern region.[100]

Provisioning Troubles. Measure 15A assesses the average duration of provisioning troubles (reported prior to service order completion) from the receipt of the reported trouble to the time the trouble is resolved.[101] For this measure, a four hour benchmark standard has been established for LNP Port-Out orders.[102] Consistent with its repeated failures on this measure in prior months, Pacific's September results for Measure 15A show that it has continued to fail, by wide margins, the 4-hour benchmark for resolving out-of-service and service-affecting provisioning troubles reported for LNP Port-Out orders.[103] Thus, in September 2002, it took Pacific 22.73 hours to resolve out-of-service provisioning troubles for LNP Port-Out orders.[104] During that same month, it took Pacific 7.84 hours to resolve service-affecting provisioning troubles reported for LNP Port-Out orders.[105]

Once Pacific completes CLEC orders, its data show that CLEC customers encounter a greater percentage of provisioning troubles than those reported by Pacific's retail customers. Pacific's data on Measure 16 (which measures the percentage of trouble reports during the first thirty days after installation) show that it has failed to perform at parity on this measure for UNE loop orders. Thus, the comments confirm that "in May, June and August, CLEC 2/4 wire loop customers experienced a higher frequency of repeat troubles within the first 30 days of service than SBC retail customers."[106]

Similarly, in July and September 2002, Pacific failed Measure 16 in Pacific's provisioning of UNE Loop 2 wire Digital Line Sharing orders in the North.[107] For example, in September 2002, 1.82

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[100] October 28 *ex parte*, Measure 7 (723600) (South).

[101] California OSS OII Performance Measurements, Measure 15A.

[102] *Id.*

[103] Toomey/Walker/Kalb Dec. ¶79.

[104] October 28 *ex parte*, Measure 15A (4691400) (LNP Port Out of Service).

[105] *Id.* (4691500) (LNP Port-Out Service Affecting).

[106] XO at 17 (footnote omitted). In September, Pacific also failed Measure 16 for Resale Centrex orders in the North. October 28 *ex parte*, Measure 16 (1605500).

[107] *Id.*, Measure 16 (1605700).

percent of Pacific's retail orders experienced troubles within 30 days of installation, while 3.27 percent of UNE Loop 2 wire Digital Line Sharing orders experienced such troubles in the North.[108] Pacific's September results also show that, 10.29 percent of Pacific's retail orders experienced provisioning troubles, while 18.18 percent of CLEC DS1 loop orders reported such troubles in Los Angeles.[109]

2. Maintenance and Repair

This Commission has held that, once a CLEC requests repair and maintenance service, the BOC must "restore service to the customers of competing carriers in substantially the same time and manner that it restores service to its own customers," and the maintenance and repair work that it performs for CLEC customers must be at "substantially the same level of quality that it provides to its own customers."[110] Pacific's own reported results preclude such a finding. Critically, Pacific's September results confirm that Pacific's performance, particularly in the area of maintenance and repair, is woefully inadequate. This trend of discriminatory performance – which is evidenced in Pacific's own results – is especially disturbing because these performance failures have occurred while the Application is pending (when Pacific's incentive to demonstrate full compliance should have been at its peak) and after Pacific purportedly implemented various improvement programs that were ostensibly designed to assure statutory compliance.

Trouble Reports. The DOJ correctly observes in its evaluation that, in September 2002, Pacific failed Measure 19 (Customer Trouble Report Rate) for UNE-P orders.[111] Indeed, from November 2001 through April 2002 and from June 2002 through September 2002, Pacific failed the parity standard for this measure for UNE-P orders. During these periods, CLEC trouble report rates were consistently higher than those reported by Pacific's retail customers.[112] And, tellingly, Pacific

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[108] *Id.*

[109] *Id.*, Measure 16 (LA) (1610300) (LA).

[110] *New York 271 Order* ¶ 211.

[111] DOJ Eval. at 3 n. 10.

[112] Thus, for example, in September 2002, the trouble report rate for Pacific's retail orders was 0.47, while the trouble report rate for UNE-P orders was 0.71. October 28 *ex parte*, Measure 19 (1993600). Similarly, Pacific's performance

has continued to fail to achieve statistical parity on this measure despite its assurances that its UNE-P maintenance improvement plan "ensure[s] that facility problems on UNE-P circuits . . . are quickly identified and resolved."[113]

The comments also confirm that Pacific fails to perform at parity when clearing by the commitment time those troubles which are reported by CLECs. Pacific's performance in this area is captured in Measure 20 (Percentage of Customer Trouble Not Resolved in Estimated Time). Pacific's own data show that, in four of the past five months for which data are reported, Pacific failed this measure for CLEC DS1 loop orders.[114] Thus, in September, 26.85 percent of Pacific's retail trouble reports were not resolved within the estimated time, while 38.80 percent of CLEC DS1 loop orders were not resolved by the commitment time.[115]

Importantly, Pacific's poor DS1 loop maintenance performance has continued unabated notwithstanding implementation of its DS1 UNE loop maintenance improvement plan which purportedly ensures that CLEC trouble tickets for DS1 loops "are given special priority for repair."[116] Indeed, in its Application Pacific conceded that it had failed Measure 20 repeatedly, but asserted that, as a result of its remedial program, it had effectively reduced the parity gap for DS1 loops to approximately 4% in July.[117] Pacific's September results, however, show that Pacific's much-heralded improvement plan has not had the intended effect. If anything, Pacific's September results show that the parity gap is widening and that, for Measure 20, the percentage of missed commitments for CLEC DS1 loop orders is now 12 percent greater than that for Pacific's retail orders.

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results show that it failed Measure 19 from July through September 2002 for UNE Loop 2 wire Digital Line Sharing orders. From April through July 2002 and in September 2002, Pacific also failed Measure 19 for Resale Centrex orders. *Id.*, Measure 19 (1994100) (1991900).

[113] Motta Aff. ¶ 41; DOJ Eval. at 3 n.10 (noting that Pacific failed Measure 19 despite "efforts to improve performance").

[114] XO at 17 (noting that "more DS1 loop customers statewide did not have their service restored within the estimated time in May, June and August"); October 28 *ex parte*, Measure 20 (2095801).

[115] October 28 *ex parte*, Measure 20 (2095801).

[116] Motta Aff. ¶ 50; XO at 10 (noting that "[c]ontrary to SBC Pacific's claims" of corrective measures, its performance is still "failing").

[117] Motta Aff. ¶ 50.

Similarly, in September 2002, Pacific's results for Measure 20 show that it failed to perform at parity when clearing troubles reported for UNE Dedicated Transport-DS3 orders. During that month, 5.88 percent of Pacific's retail trouble reports were not cleared within the commitment time, as compared with 41.67 percent of UNE Dedicated DS3 troubles that were unresolved within the expected time period.[118]

Time to Restore. The comments confirm that Pacific takes longer to restore the service of CLEC customers than Pacific's own retail customers. As an example, "in May, June, July and August, it took SBC Pacific longer to restore the service of CLEC DS1 loop customers than SBC Pacific's retail" customers.[119] True to form, Pacific failed to perform at parity in September. During September, Pacific took 3.14 hours to resolve troubles reported by its retail customers, but 4.28 hours to resolve troubles reported by CLECs for DS1 loop orders.[120]

Notably, Pacific's performance has not improved despite its claims that its DS1 UNE loop maintenance improvement plan would assure swift handling of CLEC DS1 loop trouble tickets.[121] In its Application, Pacific asserted that its DS1 UNE loop maintenance improvement plan had reduced the parity gap, and that the trouble restoral interval for CLEC DS1 loops "was just 0.14 hours (about eight minutes) longer than Pacific's retail customers" in July.[122] However, Pacific's September data show that its improvement plan "does not appear to be working."[123] As noted above, in September, the difference in the trouble restoral intervals for CLEC DS1 loops and retail orders was slightly more than one hour.

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[118] October 28 *ex parte*, Measure 20 (2097002).
[119] XO at 17. *See also* Toomey/Walker Kalb Decl. ¶ 78.
[120] October 28 *ex parte*, Measure 21 (2196001).
[121] Johnson Aff. ¶ 138; Motta Aff. ¶ 51.
[122] Motta Aff. ¶ 51.
[123] XO at 18.

Additionally, Pacific's reported results show that, in September 2002 (as well as in July 2002), Pacific failed the performance standard for Measure 21 for UNE Dedicated Transport DS1, as well as UNE Dedicated Transport DS3.[124] During September 2002, it took Pacific, on average, 3.12 hours to restore troubles reported by its own retail customers, but 5.13 hours to restore trouble reported by CLECs for UNE Dedicated Transport DS1 orders. During September, the average time to restore troubles reported by CLECs for UNE Dedicated Transport DS3 orders was twice as long as that for Pacific's own retail customers.[125]

In September 2002, as in July and August 2002, Pacific failed Measure 21 for UNE-P orders.[126] In September, it took Pacific 7.52 hours to resolve troubles reported by its retail customers, but 9.11 hours to resolve troubles reported by CLECs for UNE-P orders. Critically, Pacific's most recent results for UNE-P orders show that its performance is wholly inadequate notwithstanding Pacific's claims that it has "implemented operational improvement plans to *ensure* parity is achieved (or continued) for all maintenance items for UNE-P services."[127]

Repeat Troubles. The comments confirm that CLECs experience more repeat troubles than those reported by Pacific's retail customers for Measure 23. Thus, for example, the comments show that "in May, June and August, CLEC 2/4 wire loop customers experienced a higher frequency of repeat troubles within the first 30 days of service than SBC Pacific retail customers."[128] Pacific's September results show that other categories of CLEC loop orders have experienced more repeat troubles than those reported by Pacific customers. In September 2002, 12.09 percent of Pacific's retail orders reported repeat troubles, while 16.69 percent of CLEC UNE Loop 2 wire Digital xDSL capable

[124] October 28 *ex parte*, Measure 21 (DS1) (2197201), (DS3) (2197202).

[125] *Id.*, Measure 21 (2197202) (showing that the average time to resolve troubles reported by Pacific's retail orders was 1.20 hours, while the average time to resolve troubles reported for UNE Dedicated Transport DS3 orders was 3.48 hours).

[126] October 28 *ex parte*, Measure 21 (2197401).

[127] Johnson Aff. ¶ 156 (emphasis added).

[128] XO at 17 (footnote omitted).

orders reported such troubles.[129] Similarly, in September, 23.55 percent of Pacific's retail orders reported repeat troubles, while 28.71 percent of CLEC DS1 loop orders reported such troubles.[130]

Disturbingly, Pacific's data for Measure 23 show that its performance for UNE-P orders has declined.[131] In this regard, from November 2001 through February 2002, Pacific failed Measure 23 for UNE-P orders. However, from March 2002 through July 2002, Pacific reversed course and achieved parity. Unfortunately, Pacific's most recent data reveal that Pacific's performance is deteriorating. Pacific's August 2002 results show that 7.51 percent of Pacific's retail orders experienced repeat troubles, while 8.67 percent of UNE-P orders experienced such troubles. In September, Pacific once again failed to perform at parity. In September, 7.18 percent of Pacific's retail orders experienced repeat troubles, while 9.15 percent of UNE-P orders experienced such troubles.[132] And, of course, these failures occurred after Pacific assured this Commission that its implemented improvement plans would "ensure parity is achieved" for "UNE-P services."[133]

As the DOJ correctly observes, Pacific has admitted, in many instances, that it has failed parity and benchmark standards.[134] However, Pacific entreats this Commission to turn a blind eye to these performance failures and find solace in Pacific's assurances of various remedial steps that it claims have dramatically improved and will continue to improve its performance. Pacific's September results show that its much-touted improvement plans simply have not worked. More fundamentally, such unfulfilled promises are entitled to no evidentiary weight in these proceedings and simply highlight the

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[129] October 28 *ex parte*, Measure 23 (2392801).

[130] *Id.*, Measure 23 (2392901).

[131] October 28 *ex parte*, Measure 23 (2393600); DOJ Eval. at 3 n. 10 (citing Pacific's performance failure in September for UNE-P).

[132] *Id.* During September 2002, Pacific also failed Measure 23 for Resale Business POTS orders. During that month, 7.18 percent of Pacific's retail orders experienced repeat troubles, while 11.63 percent of Resale Business POTS orders experienced such troubles. Similarly, in September, 8.48 percent of Pacific's ILEC dedicated trunks experienced repeat troubles, while 14.71 percent of interconnect trunks experienced repeat troubles. October 28 *ex parte*, Measure 23 (2391700), Measure 23 (2393700).

[133] Johnson Aff. ¶ 156.

[134] DOJ Eval. at 3 n. 10.

fact that Pacific's Application is premature. The standards that the Commission has established for Section 271 are too vital to the future of local competition in California to warrant compromise now. Appeasing Pacific now by lowering the compliance bar would simply reward it for failing to comply with its statutory obligations.

III. THE CPUC HAS FOUND THAT PACIFIC HAS NOT FULLY IMPLEMENTED ITS RESALE OR LOCAL NUMBER PORTABILTY CHECKLIST OBLIGATIONS.

As many commenters note, this is the first 271 application the Commission has considered in which the state commission expressly found that the BOC had *not* satisfied all fourteen items on the competitive checklist. The comments confirm the CPUC's findings that Pacific has not satisfied its obligations with respect to resale and local number portability.

A. The Comments Demonstrate That Pacific Has Not Satisfied Its Resale Obligations.

As the commenters note, the CPUC expressly found that Pacific has not satisfied checklist item 14 because it is improperly attempting to evade its obligations to resell DSL transport services by spreading its DSL operations across two affiliates, in violation of the D.C. Circuit's decision in *ASCENT* v. *FCC*, 235 F.3d 662 (D.C. Cir. 2001).[135] As PacWest notes (at 24), "Pacific is playing word and shell games to avoid its resale obligations." As PacWest correctly concludes (at 25), "the Commission should make clear that regardless of the way Pacific defines its DSL product or structures the delivery of the product to the end user it cannot evade the requirements of Section 251(c)(4) and *ASCENT*."

Indeed, the D.C. Circuit's recent decision involving the *Massachusetts 271 Order* simply underscores the importance of the issue, and the need to reject Pacific's application on this basis. In the Massachusetts case, as of the date of the application Verizon was refusing to resell its DSL service using the device found to be unlawful in *ASCENT*.[136] The court affirmed the grant of interLATA authority only because Verizon "had filed a tariff" to comply with its resale obligations during the

[135] *See* CPUC 2002 271 Decision 291-220; XO at 24-25; Sprint at 14.

pendency of the application and thus rendered the issue of whether Verizon's prior failure to meet its DSL resale obligations "moot."[137] In so holding, the Court explained that the issue was not one that would evade future review, for it would be posed "if Verizon were to retract its resale discounts in this case, or withhold resale discounts in other states with respect to which it files a § 271 application."[138] Here, as the CPUC found, Pacific expressly withdrew its retail DSL transport offer in an effort to evade its resale obligation, relying on the subterfuge of spreading its telecommunications and information service components across two subsidiaries. The CPUC expressly found Pacific's practices to be severely harmful to the DSL market in California, and the comments and the D.C. Circuit's opinion confirm that the Commission should find that Pacific has not fully implemented its DSL resale obligation.

B. The Comments Demonstrate That Pacific Has Not Demonstrated Full Implementation of Its Local Number Portability Checklist Obligations.

The comments show that Pacific's processes and procedures with respect to stand-alone number portability do not satisfy its number portability obligations under Item 11 of the competitive checklist.[139] These processes and procedures have resulted in unexpected loss of dial tone for a number of end-users, because they have not properly accounted for last-minute cancellations and rescheduling by customers. Loss of dial tone "will frustrate the customer[,] who will blame the CLEC regardless of the fact that Pacific Bell is at fault."[140]

The comments agree that the implementation of a "mechanized NPAC check" would avoid the loss of dial tone caused by Pacific's deficient processes and ensure that customers migrating from Pacific to a CLEC will be able to retain their existing telephone number without impairment of quality, reliability, or convenience. The comments also show that, as the CPUC found, the absence of a

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[136] *See WorldCom, Inc.* v. *FCC*, slip op. at 8-9.

[137] *Id.*

[138] *Id.*

[139] AT&T at 49-55; PacWest at 21-23; Sprint at 14-15; XO at 2, 21-24.

[140] PacWest at 21; AT&T at 49-53.

proven, effective mechanized NPAC check precludes any finding that Pacific is in compliance with Item 11 of the checklist.[141]

Although Pacific appears finally to have implemented the mechanized NPAC check on September 30, 2002, the comments agree that the implementation of the functionality is so recent that it would be premature to conclude that the functionality is adequate.[142] Although the CPUC required Pacific to provide 30 days of operational data on the mechanized NPAC check that the CPUC has required to verify implementation of this functionality,[143] the "Supplemental Notice of Compliance" regarding the mechanized NPAC check which Pacific filed with the CPUC on November 1, 2002 provides no basis for finding that the new functionality is effective. In that filing, Pacific failed to present any data regarding the occurrence and duration of outages under the new functionality. This omission is particularly stark in the face of evidence that some of AT&T's customers experienced outages – more than one-third of which have lasted 24 hours or more – after Pacific implemented the mechanized NPAC check.[144] Thus, as XO states, "the Commission lacks a sufficient record for determining that SBC Pacific meets the requirements of checklist item 11."[145]

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[141] AT&T at 53-55; PacWest at 21-23; XO at 22. Although both the DOJ and the Broadband Institute question whether the implementation of a mechanized NPAC check is required for compliance with Item 11 of the checklist, the authorities that they cite provide no basis for their position. For example, the *Five-State 271 Order* cited by the DOJ is inapplicable here because, at the time of its application, BellSouth (unlike Pacific) had already implemented a process that had been shown to be effective (especially in connection with the problem of last-minute cancellations). *See Five-State 271 Order* ¶ 263; DOJ Eval. at 4 n.15. The Commission's *New Jersey 271 Order*, which is cited by the Broadband Institute, did not even analyze the number portability issue, because that issue was not in dispute in that proceeding. *See New Jersey 271 Order* ¶ 164; Broadband Institute at 2.

[142] AT&T at 55; XO at 22.

[143] *Id.*

[144] Willard Reply Decl. ¶¶ 18-23

[145] XO at 22. The denial of Pacific's application for lack of sufficient operational data regarding the mechanized NPAC check is particularly warranted here. Pacific alone controlled the timing of the filing of its application with the Commission, and could have delayed its filing until it had collected sufficient operational data. Instead, it chose to file its application even before it implemented the NPAC check. More importantly, Pacific could have – and should have – implemented the NPAC check long ago, rather than take more than two years to implement it after AT&T first requested such a mechanized process. *See* AT&T at 53-54. As PacWest states, "What is particularly troubling about this situation is that Pacific Bell had the ability to implement this process but failed to do so for so many years. Then when it finally conceded that it could implement the process it proffered inflated implementation times. The CA PUC was correct to find this a critical barrier to entry, and Pacific Bell's failings in this area alone are sufficient to mandate a denial of the Application." PacWest at 22-23.

IV. PACIFIC'S ENTRY INTO THE INTERLATA MARKET IS NOT CONSISTENT WITH THE PUBLIC INTEREST

Finally, the comments strongly confirm, as the CPUC itself found following proceedings spanning over five years, that granting Pacific's application would not be "consistent with the public interest, convenience and necessity."[146] Importantly, this Commission has never before granted a BOC's section 271 application under circumstances, as here, where a state commission has determined that such entry would not serve the public interest. SBC's continuing pattern of anticompetitive conduct, which persists notwithstanding the recent imposition by this Commission and the CPUC of three record-setting fines that total $58 million, confirms that financial penalties alone are not sufficient to deter SBC or Pacific from obstructing competition. Under such circumstances, as numerous commenters establish, no finding can reasonably be made that a grant of Pacific's application would be consistent with the public interest.

A. The CPUC's Decision Is Deserving Of Substantial Deference.

A number of commenters underscore the CPUC's determination that the public interest would not be served by Pacific's entry into the interLATA market at this time.[147] As these commenters have highlighted, the CPUC specifically concluded that Pacific was unable to establish that it would not engage in anticompetitive behavior if granted interLATA authority, that it would not engage in improper cross subsidization, and that its entry into the interLATA market would not harm competition.[148] The CPUC came to this conclusion based on an extensive factual record as well as its expert and detailed understanding of the California markets and the status of competition in those markets. As the CPUC aptly summarized: "Pacific's less than complete progress has given California technical, not actual, local telephone competition."[149]

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[146] 47 U.S.C. § 271(d)(3)(C).

[147] PacWest at 4-21; Vycera at 16-23; XO at 25-29; Sprint at 12-13; Paging Systems/Touch at 7-9; ASCENT at 17; California ISPs Ex Parte Letter to Tracey Wilson, Competition Policy Division (Oct. 7, 2002).

[148] PacWest at 4-12, 17-18; Vycera at 19-24, 28-29; XO at 27-29; Sprint at 12-13.

[149] CPUC 2002 271 Decision at 268.

The commenters properly stress the deference the CPUC's decision deserves, especially in light of the fact that CPUC reached this conclusion following an exhaustive five-year investigation.[150] This Commission has itself frequently recognized that "the state commissions' knowledge of local conditions and experience in resolving factual disputes affords them a unique ability to develop a comprehensive factual record regarding the opening of the BOCs' local markets to competition."[151] Such deference is especially appropriate where, as here, the state commission's conclusions are the product of a thorough fact finding effort. Thus, the Commission has made clear that it will "consider carefully" state determinations of fact if they "are supported by a detailed and extensive record."[152] Indeed, in its *New York 271 Order* the FCC stated that "where the state has conducted an *exhaustive and rigorous investigation* into the BOC's compliance with the checklist, we may give evidence submitted by the state substantial weight in making our decision."[153]

In addition, as a number of commenters point out, the Commission has never suggested that such deference is any less appropriate where a state commission evaluates public interest issues rather than checklist issues.[154] Instead, the Commission has repeatedly encouraged state commissions to develop records and make determinations on whether granting a BOC's section 271 application would serve the public interest. For example, in the *Michigan 271 Order* the Commission called on state commissions to analyze and report on the "state of local competition" for purposes of aiding the Commission's "assessment of the public interest," and recognized that the state commissions were especially "well-situated to gather and evaluate" such information.[155] Similarly, the Commission regularly has stressed that state commissions' development and oversight of appropriate performance

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[150] PacWest 18-21, 34; Vycera at 16-19; XO at 27-28; Sprint at 13.

[151] *Michigan 271 Order* ¶ 30.

[152] *See, e.g., Michigan 271 Order* ¶ 30; *South Carolina 271 Order* ¶ 30; *Kansas/Oklahoma 271 Order* ¶ 10.

[153] *New York 271 Order* ¶ 51 (emphasis added).

[154] PacWest at 20-21, 34; Vycera at 16-19.

[155] *Michigan 271 Order* ¶ 34; *see also First Louisiana 271 Order* ¶ 12 (noting that the state commission had not analyzed "the state of local competition ... as the Commission has encouraged").

measures are important to its public interest determination of whether local markets are fully and irreversibly open to competition.[156]

Moreover, as commenters have shown, besides encouraging state commissions to develop records on the public interest question, the Commission frequently has recognized and relied upon the conclusions reached by state commissions in this area.[157] For example, in the *New York 271 Order*, the Commission repeatedly cited and relied upon the New York Commission's analysis of the risk that Bell Atlantic could undermine competition in both the local and long distance markets if section 271 authority was granted, at one point noting how "significant" it was that the New York Commission had "considered and rejected" various claims that the performance plan was inadequate to deter and prevent anticompetitive conduct.[158] As this Commission has explained, such deference makes eminent sense, both because the state commissions have experience and expertise in evaluating such core competition issues in their states, and because they are in a position to spend many months and even years to gather and evaluate relevant facts, whereas this Commission faces a brief 90-day review period.[159] The Commission, therefore, in making its independent public interest determination under section 271(d)(3)(C), owes significant deference to the detailed and factually supported findings of the CPUC.[160]

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[156] *E.g. New York 271 Order* ¶¶ 429, 433, 436 & n.1333, 437 & n.1335, 440; *Second Louisiana 271 Order* ¶¶ 361-365; *Rhode Island 271 Order* ¶ 5; *Connecticut 271 Order* ¶ 3.

[157] Vycera at 18 & n.54, PacWest at 20 & nn.75-76; *see Arkansas/Missouri 271 Order* ¶¶ 4, 126 & n.401; *New Hampshire/Delaware 271 Order* ¶¶ 6, 8, 153; *Alabama 271 Order* ¶ 9; *Rhode Island 271 Order* ¶ 5; Arkansas/*Kansas 271 Order* ¶ 13.

[158] *New York 271 Order* ¶ 440; *see also id.* ¶ 436 ("we agree with the New York Commission" that its performance enforcement plan "should deter [Bell Atlantic's] incentive to provide discriminatory service").

[159] The Commission has frequently stress that because it "does not have the time or the resources during [the] 90-day statutory review period" to resolve complex disputes, and "[t]hat is why [the Commission's] decision-making process gives substantial weight to evidence that is submitted by the state." *Alabama 271 Order* ¶ 97; *see New York 271 Order* ¶ 51 ("Given the 90-day statutory deadline to reach a decision ... the Commission does not have the time or resources to resolve the enormous number of factual disputes ... [and accordingly,] where the state has conducted an exhaustive and rigorous investigation ... we may give evidence submitted by the state substantial weight in making our decision."); *Texas 271 Order* ¶ 51 (Given the limited 90-day review period, the Commission "will look to the state to resolve factual disputes whenever possible," and views the state's role as that of an "expert witness.").

[160] *See* PacWest at 20 ("[t]he Commission will need a record to make the public interest determination and the CPUC has provided the most extensive record a state commission has developed on the public interest issue"); XO California at 27

B. The CPUC's Decision Is Supported By SBC's Recent Illegal Conduct.

Commenters also have identified numerous instances of illegal and anticompetitive conduct by SBC, which further supports the CPUC's public interest determination.[161] Simply put, SBC's repeated and willful violations of state and federal laws provide no basis to conclude that the "local market is open and will remain so" if section 271 authority is granted.[162]

In fact, just three weeks ago (and after opening comments were submitted), the Commission imposed the highest fine in its history against SBC – $6 million – for having "willfully and repeatedly" violated one of the conditions imposed by the Commission in approving the SBC-Ameritech merger.[163] This fine, besides being a record for the Commission, was the maximum available by law.[164]

The merger condition at issue required that SBC offer shared transport in the former Ameritech states under terms similar to those SBC already was offering in Texas.[165] In rejecting SBC's claims that the fine imposed was excessive, the Commission stressed that it was "fully justified" because "SBC has repeatedly violated the clear terms of the merger condition."[166] The Commission found that SBC, instead of complying with the clear "legal obligation" imposed by the "plain language" of the merger conditions, embarked on a strategy of baldly refusing to provide competing carriers use of shared transport and forcing them to pursue legal actions in each of the five Ameritech states.[167] As

("[i]t would be folly for this Commission to disregard the CPUC's informed conclusions on this matter," and "the CPUC's findings" are "particularly informative"); Sprint at 12 ("[t]he CPUC's evaluation of [Pacific's] satisfaction of the requirements of [Section 709.2] is further evidence that . . . the public interest has not been met"); Vycera at 17; *see also* CPUC 2002 271 Decision, Dissent of Pres. Lynch at 3 ("[c]ertainly, the state Section 709.2 requirements provide a benchmark by which to evaluate the public interest of [Pacific's] 271 bid").

[161] MPower at 9-10 (describing how Pacific rebate program in payphone market results in unlawful price squeeze); Ernest Communications at 2-4 (same); DirectTV Broadband Comments, at 5-7 (describing how SBC's DSL retail rates "provide textbook example of price squeeze in operation"); PacWest at 26-29 (same); *id.* at 6-12; Vycera at 21-24 (discussing Pacific's history of anticompetitive conduct); Paging Systems at 3-4, 9-10 (discussing Pacific's unlawful charges imposed on paging carriers); XO at 32-33 (describing how Pacific's prices for DS1 and DS3 UNE loops effect a price squeeze).

[162] *Texas 271 Order* ¶ 431.

[163] *In the Matter of SBC Communications, Inc. Apparent Liability for Forfeiture*, File No. EB-01-IH-0030, FCC 02-282 (rel. Oct. 9, 2002), ¶ 1.

[164] *Id.* ¶ 22.

[165] *Id.* ¶¶ 4, 5.

[166] *Id.* ¶ 24.

[167] *Id.* ¶¶ 5, 26 & n.70;

the Commission thus concluded: "In state after state, throughout the Ameritech region, SBC forces competing carriers to expend time and resources in state proceedings trying to obtain what SBC was already obligated to offer, causing delays in the availability of shared transport."[168]

The conduct for which SBC was so soundly rebuked in this recent shared transport order is now being repeated regarding its legal obligation to provide new UNE combinations. In its opening comments, AT&T detailed SBC's refusal to acquiesce in even the Supreme Court's rejection of SBC's untenable position that it may lawfully deny CLECs nondiscriminatory access to what SBC deems to be "new" combinations of UNEs.[169] As with its earlier position on shared transport, SBC is undeterred by fact that its anticompetitive conduct is legally unsupportable.[170] Instead, again as with its position on shared transport, it is choosing to defy the law and its settled legal obligations by forcing competing carriers to continue to litigate with SBC in an effort to compel SBC to comply with the law. Just as with shared transport, so now with UNE-combinations, SBC is driving up the entry costs of its competitors through endless litigation in which SBC takes a frivolous legal position in order to deny or threaten to terminate CLEC access to network elements critical to mass-market residential competition.

These are but the most recent examples of SBC's refusal to comply with its plain legal obligations, and instead to treat fines, even in the millions of dollars, as simply a cost of doing business. As shown in AT&T's opening comments, over just the past thirteen months fines of $27 million and $25 million have been imposed against SBC – each records when imposed – for

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[168] *Id.* ¶ 24.

[169] AT&T at 30-36.

[170] AT&T at 30-36. As established previously by AT&T, SBC's position on new UNE combinations is based on its ludicrous contention that the Supreme Court's decision in *Verizon Comm. v. FCC,* which *upheld* the Commission's additional combinations rule, allows it to involve the "change of law" provisions in its interconnection agreements. *See Verizon Comm. v. FCC,* 122 S.Ct. 1646, 1683-87. That the CPUC and one federal district court recently rejected SBC's position has not changed SBC's anticompetitive and lawless strategy on this issue. *AT&T Comm. of Cal.* v. *Pacific Bell Tel. Co.*, Case No. C01-02517CW, Slip Op. at 42 (N.D. Cal. August 8, 2002) ("there is no evidence that the CPUC, in any decision before the Court, has required Pacific to combine elements in a manner that is broader than that required by the FCC's combination rules, which have been approved by the Court in *Verizon*")

anticompetitive and unlawful conduct in California.[171] These fines were set as high as they were because SBC's conduct was both extreme and repeated.[172]

Remarkably, even these recent examples of SBC's unlawful and anticompetitive conduct seem small in comparison with the violations identified in the independent auditor's report released earlier this year. As discussed in AT&T's opening comments, this audit, performed on behalf of the CPUC's Telecommunications Division, concluded that SBC had underreported operating income in violation of CPUC regulations by approximately *$2 billion* over a three year period, and thus avoided paying over $350 million in refunds to consumers. That the CPUC has not yet taken final action in response to this audit report in no way undermines the force or probative value of its findings in this proceeding. The report was completed by an independent and respected auditor on behalf of the CPUC, not on behalf of any interested party, and thus there is no reason to doubt the report's credibility. In addition, SBC has not even attempted to challenge the audit report's findings before this Commission, choosing instead to ignore its existence entirely. Nor is any such challenge even potentially available to certain of the audit's most damaging findings, such as its discovery that Pacific has been paying SBC $400 million per year for the use of the SBC name (a clear example of illegal subsidization) and its recitation of SBC's numerous (and partially successful) attempts to interfere with and delay the audit. Finally, given the massive size of the identified illegal underreporting of income, even if this report had significant errors (and, again, no errors have been identified here by SBC) it nonetheless would reflect substantial unlawful reporting that avoided millions in lawfully-required refunds.

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[171] In imposing the $25.55 million fine (on September 20, 2001) for marketing abuses, the CPUC stressed that Pacific's "serious violations" of law were "compounded by the fact that Pacific Bell [previously] engaged in similar conduct." CPUC Marketing Practices Decision, 9.4 (Attachment 6 to AT&T Comments). The CPUC concluded that while it "had hoped that the sanctions imposed in the 1986 marketing case would have permanently deterred Pacific Bell's abusive marketing practices," it concluded that "[s]adly, they did not," and that PacBell instead chose "to resume unlawful practices to the detriment of its customers, both in terms of time and money." *Id.* The recent $27 million penalty against SBC (which resulted from SBC's settlement of a complaint by the Utility Consumer's Action Network) was approved by a CPUC Administrative Law Judge on September 27, 2002. *See* AT&T at 76-77.

[172] *See* AT&T at 76-78.

In sum, these repeated instances of gross unlawful and anticompetitive conduct by SBC over just the past year – supported by findings of this Commission, the CPUC, and an independent auditor – fully support the CPUC's public interest findings and provide no reasonable basis to conclude that SBC will refrain from such conduct in the future should it be granted in-region interLATA authority in California. This conduct confirms that the repeated imposition of fines, even of record size, is insufficient to deter SBC from pursuing anticompetitive efforts to delay and deter local competition. The record thus fully confirms the CPUC's concerns that the progress Pacific has made toward opening its local markets is incomplete and far from irreversible. The only reasonable conclusion based on this undisputed record is that, were this Commission to grant this 271 application, SBC will continue to engage in such unlawful and anticompetitive conduct, and, given its evident and continuing market power, would continue to absorb whatever fines this Commission and the CPUC might levy as a cost of maintaining its monopoly over local residential and DSL service and leveraging that monopoly into the long distance market.[173]

C. Commenters Identify Further Evidence Of PIC Administration Abuse.

The commenters also recognize that Pacific's extremely poor record as the Preferred Interexchange Carrier (PIC) administrator in California renders Pacific's entry into the interLATA market inconsistent with the public interest at this time. As both the CPUC and the commenters note, Pacific has an inherent conflict of interest between its "duty to administer PIC changes in a competitively neutral way and its interest in winning customers," the CPUC concluded that "a substantial possibility of harm to the intrastate long distance telephone market exists from Pacific's continuing role as the PIC administrator."[174] Indeed, the CPUC has acknowledged that the number of intraLATA toll PIC disputes rose significantly once intraLATA equal access was implemented in

[173] *See* CPUC 2002 271 Decision, at 264 (recognizing "the harm to the public harm to the public interest if actual competition in California maintains its current anemic pace, and Pacific gains intrastate long distance dominance to match its local influence").

[174] CPUC 2002 271 Decision at 301; PacWest at 16-17; Vycera at 28-29.

California.[175] Further recognizing this problem, a CPUC Administrative Law Judge recently ordered an independent third party audit of Pacific's PIC administration.[176]

The comments provide substantial evidence that the levels of PIC dispute charges issued by Pacific as PIC administrator have been many times greater than those of any other ILEC.[177] For example, Vycera states that "the number of [PIC] change disputes that [Pacific] attributed to Vycera increased dramatically once Vycera began selling intraLATA toll service in competition with [Pacific], from a range of 2-3% prior to Vycera's entry into the California intraLATA toll market, to as high as 25% thereafter."[178] Vycera states that it was forced to exit the intraLATA toll market in California, and Vycera confirms that it did not experience the same increase in PIC change disputes in other states or with other BOCs.[179] These comments further confirm the CPUC's findings that "Pacific had improperly billed AT&T for customers that switched to AT&T and then returned to Pacific under Pacific's winback program, and that Pacific's coding of complaints in its billing system may be inaccurate."[180]

The comments thus confirm the CPUC's conclusion that "a substantial possibility of harm to the intrastate long distance telephone market exists from Pacific's continuing role as the PIC administrator."[181] The CPUC correctly concluded that, in light of the evidence in the record, "absent competitively neutral and nondiscriminatory PIC dispute reporting and administration, there is a possibility that the intrastate interexchange telecommunications market will be harmed through increasing carrier conflicts." Pacific has made no attempt to refute these showings, and instead has

[175] CPUC 2002 271 Decision, at 260.
[176] CPUC, Opinion on Slamming Complaints, D. 02-10-006 (Oct. 3, 2002).
[177] *See* AT&T at 79-81; Vycera at 30.
[178] Vycera at 30.
[179] *Id.* at 31-32.
[180] Opinion on Slamming Complaints, *AT&T Comm. of Calif.* v. *Pacific Bell Telephone Co.*, Case No. 99-12-029, D.02-10-006, at 5 (Oct. 3, 2002); Vycera at 32-36.
[181] CPUC 2002 271 Decision at 301.

claimed that there is "nothing in the record to call into question Pacific's actual performance as the PIC administrator" in the hope that the Commission will simply ignore the CPUC's express findings and considered judgment.

For these reasons, Pacific's continuing role as the PIC administrator in California creates unacceptable risks of anticompetitive behavior if it were permitted to enter the interLATA market. The CPUC has decided to initiate an investigation into "the efficacy, feasibility, structural implementation, and selection criteria for selecting a competitively neutral third-party Preferred Interexchange Carrier administrator for California,"[182] and the CPUC should be permitted to conduct its investigation[183]

D. Commenters Echo The CPUC's Conclusion That The Development Of Local Competition Has Been "Anemic."

The comments also confirm that the development of local competition in California is extremely limited, especially with respect to DSL services. Indeed, many commenters note the CPUC's express findings that the development of local competition in California has been "anemic."[184] A recent CPUC report found that "[c]ompetition in the local market is currently very limited," with data showing that ILECs hold "dominant positions" statewide, controlling "between 94 and 96.4 percent of local phone lines,"[185] and as several commenters note, CLEC market share in California is lower (and often substantially lower) than CLEC market share in almost every other large state, and is lower than the national average.[186] And as AT&T explained, the California ILECs' local market *revenues* as a percentage of total local market revenues have ranged between 98.7% and 99.0% during

[182] *Id.* at 320.

[183] *See* PacWest at 17 ("Unless the PIC administration function is put in the hands of a neutral third party, Pacific could easily create new ways to obstruct or even halt PIC change requests by its competitors").

[184] *See* CPUC 2002 271 Decision at 264; *see also* PacWest at 15.

[185] The Status of Telecommunications Competition in California, CPUC, at 1.1 (June 5, 2002).

[186] *See, e.g.*, PacWest at 14-15; Vycera at 26-27; XO at 27-28.

the period from 1998 through 2000,[187] and the growth in the percentage of total revenue for CLECs from 1998 (1.062 %) and 2000 (1.268%) reflects a striking lack of improvement.[188]

Thus, the comments overwhelmingly confirm the CPUC's conclusion that local competition "has yet to find its way into the residences of the majority of California's ratepayers."[189] Instead, as the CPUC specifically concluded: "Pacific's less than complete progress has given California technical, not actual competition," and "we foresee harm to the public interest if actual competition in California maintains its current anemic pace, and Pacific gains intrastate long distance dominance to match its local influence."[190]

As the comments also demonstrate, Pacific's actions to maintain its dominance in DSL services also render its application contrary to the public interest. As many commenters note, once it became clear that Pacific would be required to offer resale of its DSL services under Section 251(c)(4) after the D.C. Circuit's decision in *ASCENT*, Pacific simply withdrew its retail DSL offering in an attempt to avoid its resale obligations.[191] As a result, competitors in California cannot resell Pacific's DSL services, and (predictably) "Pacific's DSL market dominance in California is increasing while its competitors' DSL market share is decreasing."[192]

In addition, the CPUC held that "Pacific has erected unreasonable barriers to entry in the California [DSL] market" not only because of its refusal to resell DSL service, but also "by offering restrictive conditions in the SBC Advanced Solutions Inc. (ASI)-CLEC agreements in contravention of

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[187] *Id.* at 3.12-3.13.

[188] CPUC 2002 271 Decision at 264; *see also* Sprint at 11 ("in the six years since the Telecommunications Act of 1996 was enacted competitors [have] not [been] willing to make a sizeable investment in residential competition").

[189] CPUC 2002 271 Decision at 4.

[190] CPUC 2002 271 Decision at 264, 268.

[191] *See, e.g.*, CPUC 2002 271 Decision at 219 ("[u]p until May 2001, Pacific marketed DSL service, not only to ISPs, but also to end-user customers").

[192] CPUC 2002 271 Decision at 227. Pacific has 97% of the California DSL market. *Id.* at 220.

Section 251(c)(4)(B)." The terms of these agreements are discriminatory for the reasons set forth in AT&T's August 23, 2001 brief filed before the CPUC (the relevant pages of which are attached).

Finally, as several commenters point out, ASI's wholesale DSL prices also effectuate a price squeeze for DSL services. As PacWest notes (at 27), "ASI provides wholesale ADSL access services and transport for more than $40 per end user customer." Pacific, however, provides retail ISP services (including the underlying DSL transport services) for $29.95 per month for the fist six months, and $42.95 thereafter.[193] Given that an ISP would have to purchase ATM services in addition to wholesale DSL, as well as incur other significant costs, "it is impossible for an independent ISP using ASI's tariffed wholesale rates to compete with the new SBC-ISP pricing."[194]

ASI's wholesale DSL pricing thus precludes competition from either a competing DSL telecommunications provider or a competing ISP. In this regard, the D.C. Circuit recently clarified that a price squeeze is relevant to the public interest analysis even if the price squeeze does not "doom[] competitors to failure." As explained by the Court in the Massachusetts 271 decision, "classic price squeeze cases have never turned on a finding that competition by the input-purchasing firms was absolutely precluded."[195] On the contrary, a proper price squeeze inquiry would assess whether "the challenged conduct has exerted *any* anticompetitive effects."[196] Pacific's decision to withdraw resale of its DSL services, and to replace it with ASI-provided wholesale arrangements that effectively preclude DSL competition, render Pacific's bid to enter the interLATA market contrary to the public interest.

Allowing Pacific into the interLATA market at a time when CLECs are still attempting to obtain a significant and sustainable presence in these local markets presents a severe risk of destroying the CLECs' recent competitive gains. Pacific will be able to market and provide bundled local and

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[193] PacWest at 28.

[194] *Id.*

[195] *See WorldCom, Inc.* v. *FCC*, slip op. at 8.

interLATA services to a degree CLECs will be unable to match, leveraging its local market dominance into the interLATA market. Indeed, SBC itself boasts that it will gain 30% of the interLATA market within one year of section 271 approval. Coupled with its 90+% local market share, Pacific's entry at this time will undoubtedly undermine, not promote, telecommunications competition in California.

For all of these reasons, the comments confirm and the record shows that it is premature to authorize Pacific's application for interLATA authorization in California. The tenuous nature of local competition to date, and SBC's and Pacific's continuing pattern of anticompetitive conduct – unaltered notwithstanding record state and federal financial penalties – is overwhelming evidence that stronger measures are needed to secure the opening of the local market in California to fair and sustainable local competition. Rather than giving SBC a green light to continue to block local competition, the Commission should exercise the authority that Congress intended it to use to protect the public interest, and send SBC an unmistakable signal that such anticompetitive conduct must stop before any further 271 applications are granted.

[196] *See id.* (quoting *Anaheim* v. *FERC*, 941 F.2d 1234, 1238 (D.C. Cir. 1991) (emphasis added).

CONCLUSION

For the reasons stated above, and for the reasons in AT&T's opening comments, Pacific's section 271 application for California should be denied.

Respectfully submitted,

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November 4, 2002

CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of November, 2002, I caused true and correct copies of the forgoing Comments of AT&T Corp. to be served on all parties by mailing, postage prepaid to their addresses listed on the attached service list.

Dated: November 4, 2002
Washington, D.C.

/s/ Peter M. Andros

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of Application of SBC Communications, Inc. Pursuant to Section 271 of the Telecommunications Act of 1996 To Provide In-Region, InterLATA Services in California	))))))	WC Docket No. 02-306

REPLY DECLARATION OF

WALTER W. WILLARD

ON BEHALF OF AT&T CORP.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of Application of SBC Communications, Inc. Pursuant to Section 271 of the Telecommunications Act of 1996 To Provide In-Region, InterLATA Services in California	))))))	WC Docket No. 02-306

REPLY DECLARATION OF WALTER W. WILLARD
ON BEHALF OF AT&T CORP.

1. My name is Walter W. Willard. I am the same Walter W. Willard who submitted a declaration in this proceeding on behalf of AT&T Corp. on October 10, 2002 ("Willard Opening Decl."). My educational background, employment history, and current responsibilities are described in my Opening Declaration.

2. The purpose of this Reply Declaration is to provide updated information regarding the CLECs' lack of equivalent access to alternative community names, which I described in my opening declaration. Willard Opening Decl., ¶¶ 11-21. I will also describe recent events that confirm the inadequacy of the test environment, technical assistance and help desk support that Pacific provides to CLECs. *Id.*, ¶¶ 22-42. Finally, I will discuss the mechanized Number Portability Administration Center ("NPAC") check that Pacific appears to have implemented on September 30, 2002.

3. **Access To Alternative Community Names.** As I have previously described, due to Pacific's failure to provide AT&T with access to information regarding alternative ("prestige") community names, nearly 6 percent of AT&T's UNE-P orders were

rejected in August 2002 because the community name on the orders (which was the postal community name) did not match the alternative community name in the customer's directory listing. *Id.*, ¶¶ 12-15. The error that the rejection notices listed for these orders was either CF 110 (Invalid locality name in California/Nevada) or CF 284 (Main listing locality and exchange not valid for a Pacific Bell Directory).

4. On October 9, 2002, Pacific implemented a "fix" that was purportedly designed to eliminate this problem by permitting orders to proceed through its systems even when the community name on the LSR does not match that in the directory listing.[1] Although this "fix" has reduced the extent of order rejections due to the failure to use an alternative community name, the problem does not appear to have been eliminated entirely. During the one-week period from October 20 through October 26, almost one percent of AT&T's orders were rejected under error codes CF 110 or CR 0284. Thus, while the error rate attributable to the problem is below the previous level of 5.9 percent, rejections are still occurring.

5. AT&T advised Pacific last week that it was still receiving rejection notices with the error codes CF 110 or CF 284. Pacific responded that the rejections might be occurring if AT&T is obtaining community name information from the customer service record ("CSR"), rather than from the address validation functionality – which, according to Pacific, is the only functionality (as a result of the "fix") that provides consistently reliable community names. Upon investigation, however, AT&T determined that the community name on each of the rejected orders was obtained from the address validation function, rather than from the CSR.

[1] Pacific also implemented a separate "fix" on October 15 that was based on its assumption that CLECs are using alternative community names on LSRs, and that orders containing such names are being rejected because its systems are editing orders for postal community names. *See*

Thus, the continuing rejections are occurring because the "fix" has not been totally effective – not because AT&T is obtaining information from the wrong source.

6. The fact that orders are still being rejected for failure to use alternative community names is inexcusable, since the rejections are due solely to Pacific's refusal to grant CLECs access to the same information regarding such names that it has in its own retail operations. More fundamentally, these continuing rejections deny CLECs parity of access and a meaningful opportunity to compete. Whenever an order is rejected for failure to use the proper alternative community name, a CLEC must submit another LSR with the proper community name. For a CLEC offering service on a mass-market basis, this procedure will require the expenditure of thousands of additional hours of labor and thousands of dollars in additional expenses. *See id.*, ¶ 16. Moreover, the need to resubmit the LSR may result in delay of the provisioning of a customer's order.

7. **Failure To Provide an Adequate Test Environment.** AT&T's recent use of Pacific's test environment provides further confirmation that the test environment does not mirror the production environment. Within the last few months, AT&T implemented in its own systems the capability to migrate an existing AT&T customer served through the UNE platform to service through UNE loops Such migrations are an essential part of achieving AT&T's objectives of providing local exchange service through its own facilities, and of providing DSL service as part of a bundled package with local exchange service.

8. AT&T submitted orders for migrations from the UNE-P to UNE loops in Pacific's test environment during September and October. During the test, AT&T included the

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Willard Opening Decl., ¶ 19.

customer's directory listing on some of the migration orders. For each of the test orders, AT&T received a firm order confirmation, and the order was completed.

9. During the week beginning October 20, 2002, AT&T began submitting these types of migration orders to Pacific in actual commercial production as part of service readiness testing. On October 20, AT&T submitted a commercial order for a migration from the UNE-P to the UNE loop. The order contained the customer's directory listing. During the remainder of that week, AT&T submitted additional commercial migration orders with such information. In the case of each such order, AT&T received a rejection notice with the error code of CR001 ("Another main listing already received for LTN/TN"). Only at that point did AT&T learn that Pacific's business rules call for rejection of a migration order that includes the customer's directory listing if the CLEC is not requesting any modification of the directory listing. Although the rejections in production were thus consistent with Pacific's business rules, they were inconsistent with the results obtained in the test environment, where the orders were accepted and processed by Pacific's systems. Because it was clear that any order for a migration from UNE-P to UNE loops would be rejected in production if it contained directory listing information, AT&T stopped sending any more such orders on October 23, 2002.

10. When AT&T contacted Pacific about the difference in results, Pacific acknowledged that "the input data sent in production resembles what was previously sent in [the] test."[2] After further investigation, Pacific acknowledged that the problem was occurring because

[2] Electronic mail message from Melonie Grant (SWBT) to Walter W. Willard and Patricia W. Grant (AT&T), dated October 31, 2002 (attached hereto as Attachment 1).

"The test environment is not loaded with a copy of AT&T's production listings."[3] To date, Pacific has not implemented any solution (interim or permanent) to this problem.

11. The failure of Pacific's test environment to mirror the production environment has delayed AT&T's plans to convert existing UNE-P customers to UNE loops. The new capability tested by AT&T provided for the automatic inclusion of the customer's directory listing on the migration order. If the test environment had reflected the production environment, AT&T would have known that the inclusion of such information would result in rejection of the order. Upon discovering such rejections, AT&T could have modified the functionality, while testing was still ongoing, so that rejections would not occur. Instead, AT&T did not discover that the orders would be rejected until it began conducting service readiness testing. As a result, AT&T has been required to delay actual UNE-P to UNE-L migrations until the new capability can be modified to avoid causing order rejections. This delay has already lasted almost two weeks, with no resolution of the problem yet in sight.

12. **Pacific's Failure To Provide CLECs With Adequate Technical Assistance and Help Desk Support.** In my opening declaration, I described the failure of Pacific to provide CLECs with the assistance that they need to use the OSS successfully. This problem results, in part, from the failure of Pacific to delineate clearly the division of responsibilities between the MCPSC and the Local Service Center ("LSC"). Rather than assist CLECs, Pacific has created substantial confusion among them as to whether they should contact the MCPSC, or the LSC, to resolve particular problems. *Id.*, ¶¶ 23-26.

[3] Electronic mail message from Melonie Grant (SWBT) to Walter W. Willard and Patricia W. Grant (AT&T), dated November 1, 2002 (attached hereto as Attachment 2).

13. SBC, for example, has inconsistently described to AT&T the role of the MCPSC in handling issues related to pre-ordering and ordering transactions. In July and August, SBC (including the MCPSC) – in a reversal of a previous representation by the MCPSC – advised AT&T that CLECs must use the MCPSC for most issues relating to such transactions. *Id.*, ¶ 26. Recently, however, SBC appears to have changed its position once again.

14. On October 24, 2002, AT&T raised with its Account Manager a problem that AT&T was experiencing in reserving telephone numbers when was using the CORBA pre-ordering interface to obtain pre-ordering information for mechanized orders.[4] The Account Manager advised AT&T that it should contact the IS Call Center for assistance. As AT&T pointed out to the Account Manager, however, Pacific's February 2002 Accessible Center (which describes the responsibilities of Pacific's various centers) states that the MCPSC is the center responsible for "provid[ing] business process support to CLECs using OSS applications for pre-order/order activity in the SBC regions." By contrast, none of the functions of the IS Call Center described in the Accessible Letter would cover the TN reservation problem that AT&T was experiencing.[5]

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[4] When AT&T attempted to reserve telephone number for customers served by certain of Pacific's switches in California, it received a response stating, "No telephone numbers available." SBC ultimately advised AT&T that the problem was occurring because SBC had not properly set the parameter ("TCAT") in these California switches. By contrast, SBC found that the problem did not occur in switches in the SWBT region, and in only a small portion of switches in the Ameritech region. SBC advised AT&T that, to correct the problem in California, it would reset all of its California switches to ensure that the "TCAT" parameter is properly set.

[5] *See* Accessible Letter No. CLECC02-068, dated February 26, 2002, Att. at 1, 5 (Willard Opening Decl., Attachment 5). Pacific's Accessible Letter also states that the MCPSC assists CLECs with "issues pertaining to process flows within the applications," with "error code analysis for each application," and with "questions that are specific to data fields within individual applications." *Id.* at 1. Each of these functions encompasses problems that CLECs experience while using CORBA.

15. The statement of the Pacific Account Manager simply compounded the confusion that already exists about the MCPSC's responsibilities. Each time AT&T receives a different description of the MCPSC's responsibilities from different Pacific personnel who should be knowledgeable about those responsibilities, AT&T must revise its methods and procedures regarding contacts with Pacific's centers. A CLEC, however, cannot operate effectively if it must revise its M&Ps each week, or each month, to reflect yet another representation regarding those responsibilities by a different Pacific representative. Yet, if the latest representation turns out to be erroneous, AT&T will be required to contact the "right" center after learning that it has contacted the "wrong" one – a needless waste of time and resources.

16. The confusion engendered by Pacific, and the constant need of CLECs to change their M&Ps to reflect ever-changing statements by Pacific about the MCPSC, only make it more difficult for CLECs to obtain the assistance that they need from Pacific to use the OSS, have their problems resolved, and have their questions answered. In view of Pacific's failure to provide clear guidelines to CLECs about the respective roles of its centers, it has not provided the technical assistance and help desk support required to meet its OSS obligations.

17. **Pacific's Mechanized NPAC Check.** As I testified in my Opening Declaration, SBC appears finally to have implemented a mechanized NPAC check on September 30, 2002. Although AT&T hopes that this new functionality will prevent the outage problems that AT&T and its customers have experienced in the past due to Pacific's preexisting manual processes, the implementation is so recent that it is premature to conclude that the new functionality is adequate.

18. On November 1, 2002, Pacific filed a two-page "Supplemental Notice of Compliance" with the California PUC, purporting to include 30 days of operational data regarding the mechanized NPAC check.[6] Pacific's "Supplemental Notice," however, is insufficient to establish that its mechanized NPAC check is effective, or that Pacific has satisfied Item 11 of the checklist. Pacific devotes most of the two pages of its filing to a general description of its mechanized NPAC check. Pacific's entire discussion of the actual commercial performance of the mechanized NPAC check is confined to the following two sentences:

> As of October 31, 2002, SBC Pacific Bell received 14,207 mechanized activate messages from the NPAC on LNP conversions managed through this new process. In addition, the disconnection of 273 telephone numbers from SBC Pacific Bell's switches was automatically delayed through this new process when no activate notice was received from the NPAC.[7]

19. Although Pacific's "Supplemental Notice" mentions the number of "activate" messages received, and the number of disconnections avoided, under the mechanized NPAC check, Pacific has provided *no* data regarding the number of any outages that have nonetheless occurred, and the duration of such outages, *since the mechanized NPAC check was implemented.* This omission is a critical deficiency, because it renders the "Supplemental Notice" useless as a measure of Pacific's compliance with its number portability obligations.

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[6] *See* SBC Pacific Bell Telephone Company's (U 1001 C) Supplemental Notice of Compliance With Ordering Paragraph 6, filed November 1, 2002 ("Supplemental Notice of Compliance") (attached hereto as Attachment 3). Pacific filed its "Supplemental Notice" to comply with the CPUC's requirement that it file at least 30 days of operational data to verify implementation of the mechanized NPAC check. See *CPUC Decision* at 207, 318.

[7] Supplemental Notice of Compliance at 2. As Pacific suggests in its filing, Pacific had previously advised CLECs that LNP orders which were submitted prior to September 30, but with due dates occurring after September 30, would need to be supplemented or resubmitted – and would be processed under the mechanized NPAC check. Only after implementation, however, did Pacific discover – and advise the CLECs – that such pre-September 30 orders would be handled under the preexisting processes. *Id.* at 2 n.2.

The entire purpose of the mechanized NPAC check was to eliminate the outages that had occurred under the preexisting process, by preventing Pacific from disconnecting a number until after it had checked with NPAC to ensure that the CLEC had already ported the customer's number. Without data showing the number and duration of outages since September 30, the Commission cannot determine whether the new functionality actually eliminates the outage problem.

20. The superficial description of the mechanized NPAC check in Pacific's "Supplemental Notice" is, unfortunately, only the most recent instance of the failure of Pacific to provide details concerning the functionality. Even though it agreed 18 months ago to implement the mechanized NPAC check, and supposedly implemented the functionality more than a month ago, Pacific *still* has not provided any detailed documentation on precisely how the process will work. Instead, Pacific has provided CLECs only with an Accessible Letter which, like its "Supplemental Notice," is limited to an extremely high-level description of the process.

21. Pacific's failure to discuss outages in its "Supplemental Notice" is particularly significant because AT&T's own internal data show that some of its customers have experienced outages even when the LNP order for that customer was processed under the mechanized NPAC check. For 18 LNP orders that AT&T submitted since September 30, the customer experienced loss of dial tone during the migration of its service from Pacific to AT&T. AT&T has confirmed that these 18 outages were due to some deficiency with the new mechanized NPAC check.

22. Although Pacific will likely respond that 18 outages is a relatively small number, the occurrence of outages is a serious problem for the CLEC's customers and the CLEC

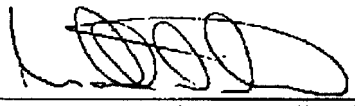
itself – regardless of the total number of outages involved. The customer not only experiences inconvenience as a result of an outage, but also is also likely to blame the CLEC for the problem. As a result, the CLEC will suffer damage to its reputation and, in some instances, will lose the customer's business.

23. In the case of the 18 outages that AT&T's customers have experienced, the loss of service has often been quite lengthy. Although 62 percent of the customers lost dial tone for less than 24 hours, 19 percent of customers lost dial tone for 24 to 48 hours, and an additional 19 percent were out of service for 48 or more hours. Due to the outages, two of the customers cancelled their service with AT&T and switched to Pacific or another LEC.

24. The omission of any data on outages in Pacific's filing, and the occurrence of outages among AT&T customers even after implementation of the NPAC check, precludes a finding that Pacific has complied with its number portability obligations. Despite Pacific's implementation of a new mechanized process, AT&T's customers continued to experience outages after the implementation date. Moreover, Pacific has not presented any data of its own regarding the occurrence of outages under the new functionality. Accordingly, the Commission does not have evidence sufficient to reject the finding of the CPUC that Pacific has not yet fully implemented its obligations with respect to Checklist Item 11.

I hereby declare under penalty of perjury that the foregoing is true and accurate to the best of my knowledge and belief.

Executed on November 4, 2002



Walter W. Willard

Attachment 1

From: TEMPLE, MELONIE (SWBT) [mailto:mt0902@sbc.com]
Sent: Thursday, October 31, 2002 4:07 PM
To: Willard, Walter W (Walt), NCAM; Grant, Patricia W (Pat), NCAM
Cc: MONTI, PAUL (AIT)
Subject: RE: PacBell P to L Migration Rejects

Walt
Pat

I had the SMEs pull test records from the SRT and they have confirmed that the input data sent in production resembles what was previously sent in test. At present SME's are investigating whether this could be attributed to a code release whereby code in test was not migrated to production or if software from Listings Gateway was loaded to a test environment and it works, but that same software was loaded to a production environment and does not work.
We're attacking this from a number of angles to narrow down where the problem resides.
More to come (possibly tonight as I'm on call awaiting PB SME's findings)
Mel

Attachment 2

From: TEMPLE, MELONIE (SWBT) [mailto:mt0902@sbc.com]
Sent: Friday, November 01, 2002 9:58 AM
To: Willard, Walter W (Walt), NCAM; Grant, Patricia W (Pat), NCAM
Cc: MONTI, PAUL (AIT)
Subject: RE: PacBell P to L Migration Rejects

Walt
Pat -

Please share this with Leo and let me know his thoughts. I believe his key concern was whether or not his team would need to write new code to address the 3.06 requirements for LOA inserts.?? At present, given the information below I do not believe that will be the case BUT I will not confirm until Monday at the earliest.
I wanted to make sure I provided some level of detail that you can share with your business clients.

Here's the deal --
The test environment is not loaded with a copy of AT&T's production listings. So when AT&T submitted their test LOA Inserts, these were viewed by Listings Gateway as NEW listings, and they were accepted. Conversely, in production the listings being submitted by AT&T already exist in the production database. So attempts to do LOA Inserts on them by AT&T are being rejected.

This production reject is how Listings Gateway has been set up to process such requests for Version 3.06. The system is reacting as programmed for 3.06.
Soon after the Plan of Record release in April 2002, edits were changed in the Listings Gateway for Version 5.00 and above; hence 3.xx version wasn't included.

Next steps??

Listings Gateway would need to execute a Change Request to apply the same logic to Version 3.06 for LOA Inserts that is being applied for Version 5.00 and above. The current situation is not a system bug. I is my understanding that if the test database had been loaded with production data for AT&T listings (which is not usually done), then the listings sent in test would have been rejected with CR001 same as they are being rejected in production.

While M&P support does not anticipate any foreseeable business reason why LOA inserts shouldn't be supported on 3.06, I will not have final confirmation of the CR approval and implementation date until Monday at the earliest when the appropriate SME's meet to discuss.

Thanks -
Mel

Attachment 3

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Rulemaking on the Commission's Own Motion to Govern Open Access to Bottleneck Services and Establish a Framework for Network Architecture Development of Dominant Carrier Networks.	R.93-04-003
Investigation on the Commission's Own Motion into Open Access and Network Architecture Development of Dominant Carrier Networks.	I.93-04-002
Order Instituting Rulemaking on the Commission's Own Motion Into Competition for Local Exchange Service.	R.95-04-043
Order Instituting Investigation on the Commission's Own Motion Into Competition for Local Exchange Service.	I.95-04-044

SBC PACIFIC BELL TELEPHONE COMPANY'S (U 1001 C)
SUPPLEMENTAL NOTICE OF COMPLIANCE
WITH ORDERING PARAGRAPH 6

On September 19, 2002, the Commission voted to endorse SBC Pacific Bell's application for long-distance relief, under Section 271 of the Telecommunications Act of 1996. (D.02-09-050, mailed September 25, 2002.) In connection with that decision, the Commission directed SBC Pacific Bell to implement a mechanized NPAC (Number Portability Administration Center) verification to minimize the possibility of service disruption to end users where competitive local exchange carriers have not completed their switch translations by the requested due date. The Commission further directed SBC Pacific Bell to provide 30 days of operational data to verify the implementation of this enhancement. (Ordering Paragraph 6.) That data is provided below.[1]

The mechanized NPAC verification process implemented by SBC Pacific Bell on September 30, 2002 enables SBC Pacific Bell's systems to monitor receipt of an "activate" message for stand alone POTS orders sent by the NPAC, which notifies SBC Pacific Bell that an acquiring CLEC has activated

[1] The data reported in this filing was derived from SBC Pacific Bell's internal databases, and constitutes the best information available at the time of filing.

the end user's number in the CLEC's switch. With this functionality, if an activate message is not received by 9:00 p.m. on the due date for the conversion, SBC Pacific Bell's systems automatically delay the disconnect of the number from SBC Pacific Bell's switch for up to 6 days – giving the acquiring CLEC additional time to reschedule the conversion with its end user, complete any necessary field work, and activate the port. SBC Pacific Bell's systems complete the disconnect order, removing the ported number from SBC Pacific Bell's switch translations, only if, during the 6-day extension period, an activate message is received from the NPAC.

As of October 31, 2002, SBC Pacific Bell received 14,207 mechanized activate messages from the NPAC on LNP conversions managed through this new process. In addition, the disconnection of 273 telephone numbers from SBC Pacific Bell's switches was automatically delayed through this new process when no activate notice was received from the NPAC.[2]

Respectfully submitted,

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November 1, 2002

[2] Prior to implementation, SBC Pacific Bell advised CLECs that, in order to be managed by the new process, stand alone POTS LNP orders placed before September 30, but with due dates after September 30, would need to be resubmitted or supplemented. Shortly after implementation, SBC Pacific Bell discovered a limited systems issue that impacted a very small number of supplemented FDT (Frame Due Time) orders, resulting in those orders not being managed by the new process. After that issue was quickly addressed (which, again, impacted only a limited subset of orders received prior to September 30th), such orders were managed appropriately.